QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:

From April 1, 1938
Through June 30, 1938

Volume XI

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from April 1, 1938 through June 30, 1938.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The Office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
A. A. CARMICHAEL,
Attorney General.

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OPINIONS

April 1, 1938

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Taxation—Sales Tax—

Licensed auctioneer selling livestock belonging to others, to the public on commission need not collect and report tax imposed by the Alabama Sales Tax Act.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry from which I quote as follows:

"Under the Gross Receipts Tax law which was recently passed by the Legislature and approved by the Governor, there is some doubt in my mind as to the status of an auctioneer.

"A party who has procured license as an auctioneer and who sells livestock of all kinds for the public for a small commission, wishes to know if he is required to pay the State of Alabama, the 1½% Gross Recepits Tax.

"In this connection, will you also advise whether this auctioneer would be liable for the collection of the 2% Sales Tax as now written and passed by the House."

A licensed auctioneer in making a sale whether of personalty or realty is by virtue of his employment primarily the agent of the seller. **6 C. J. p. 824, Section 10. Robinson vs. Garth,** 6 Ala. 204. Under these circumstances, there is no duty upon the auctioneer at any time to collect and report the tax levied by the Alabama Sales Tax Act (Laws of 1936-37, p. 125). The tax imposed by these laws is a tax upon the seller and if, in the facts cited by you, the person who employs the auctioneer is not the producer of livestock, there would be a duty upon him to collect and report the sales tax as there would be no exemption, for subdivision (c) of Section 4, of the Alabama Sales Tax Act, supra, reads:

"Amounts received from the sale or sales of livestock, poultry and other products of the farm, dairy, grove or garden, when said sale or sales are made by the producer or members of his immediate family, or employees forming a part of the producer's organization, in the original state of condition of preparation for sale; * * *"

So that conversely if the person who employs the auctioneer to sell the livestock is the producer, there would be an exemption allowed by the above section. The auctioneer, himself, merely sells the property in accordance with the terms of what might be called his contract or agency to sell. He is bound to carry out his agency contract and unless that contract contains a provision making it his duty to collect and remit the tax then there would be no duty on his part to do so. In order to make the auctioneer responsible for the collection and reporting of the tax imposed by the Alabama Sales Tax Act, it is my opinion the duty to do so would have to be expressed in his contract of agency, but the tax collecting authorities would not be bound by that contract.

Section 3 of the Alabama Sales Tax Act provides in part as follows:

"If any person, on or after the passage of this act shall engage in or continue in any business for which a privilege tax is imposed by Section 2 of this act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the Commission a license to engage in and to conduct such business * * * ."

An auctioneer is not such a business as comes within the purview of Section 2 of the Alabama Sales Tax Act, as the auctioneer is at no time the seller of the article unless he personally owns the article he puts up for sale. While the objects are to be sold are in the possession of the auctioneer, he does not assume ownership but is merely a bailee. **6 C. J. p. 842, Paragraph 57.**

Therefore, in my opinion, the auctioneer in your case would himself not be liable for the collection and reporting of the sales tax imposed by the Alabama Sales Tax Act.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 2, 1938

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Elections—If no building whatever is available in an election district which may be designated by the county governing body of a county as the place for the holding of elections in said election district, then the county governing body has the authority to erect such a building or place, at the expense of the county, for elections in said election district to be held therein.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 14, 1938, which follows:

"One of the voting places in the rural part of Dale County has no building of any sort for the accommodation of the election officers and voters. We want to accommodate these people by building a place in which they may hold elections, but the Commissioners do not find authority to pay out county funds for this purpose. Please advise if we may legally do so."

Section 431 of the Code of Alabama, 1923, provides as follows:

"Voting places designated.—The courts of county commissioners, or boards of revenue, or other governing boards of said counties, shall designate the places of holding elections in the election districts established hereunder, but there shall be in no election district more than one voting place, and said court of county commissioners, or board of revenue, or other governing body of said county shall file with the judge of probate of said county, along with the boundaries of said districts, the name of places designated for voting, and shall also post such names at the courthouse door of such county."

If there is no building whatever available in an election district which may be designated by the county governing body as a place for the holding of elections in said election district, then it is my opinion that the above section is implied authority for the county governing body to erect, at the expense of the county, a building or place for elections in said election district to be held therein. While county governing bodies generally speaking are bodies of strictly limited jurisdiction and authority and can only take such action as they are authorize to take by statute (the matters in which said bodies possess original and unlimited jurisdiction not being here material), they nevertheless have implied authority to take such action as is necessary to carry into effect the power and authority that is vested in them by statute. If there is no building whatever available in an election district, which may be designated by the county governing body as the place for the holding of elections in said election district, then it would be impossible for said county governing body to discharge the power, authority and duty conferred upon it by Section 431, supra, as to that particular election district. Consequently, it is my opinion that this section is implied authority for the county governing body to erect, at the expense of the county, such a building or place under such circumstances.

It is my opinion, however, that this shoud not be done until the county governing body has exhausted every effort to designate a building in said election district as the place for the holding of elections in the same, and has made absolutely certain that there is no such building in said election district that can be so designated. It is inconceivable to me that there might be an election district in which no building whatever is available to be so designated for such purpose.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 7, 1938

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Elections—Candidate for party nomination for office of County Superintendent of Education must file with Judge of Probate a certificate, signed by State Superintendent of Education that he holds a certificate of administration and supervision as required by law prescribing qualifications of a County Superintendent of Education, on or before the last qualifying date set by the party executive committee in order to have his name placed on the ballot.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 4, 1938, which is as follows:

"Will you please advise me if a person, under the provisions of SECTIONS 140 and 141 of the Alabama School Code, can have his name placed on the ballot as a candidate for the office of county superintendent of education in the Democratic primary to be held May 3, 1938, if said person did not, prior to March 1, 1938, receive a superintendent's certificate, and was not certified by the state superintendent of education, to the

Modified by A.G. Opinion #2002-284

probate judge of the county in which he wished to become a candidate, as having such certificate."

I am of the opinion that your inquiry should be answered in the negative.

Section 140 of the School Code of 1927, provides as follows:

"140. CANDIDATES FOR COUNTY SUPERINTENDENT.—Before any person shall become an applicant for employment by a County Board of Education, as County Superintendent of Education, and before any person shall qualify as a candidate for or for the nomination of a political party as a candidate for the office of County Superintndent of Education for a County in which such officer is elected by the qualified voters of the County, such person shall file with the Probate Judge a certificate signed by the State Superintendent of Education that such person holds a certificate of administration and supervision as required by the law prescribing the qualifications of a County Superintendent of education. At the Grand Jury of the County assembled next after making of such affidavits the record of the same shall be submitted to the grand jury. In any prosecution for perjury under this Section the record of the affidavit shall be admissible in evidence."

It will be seen from the above that one of the prerequisites or conditions precedent to **qualifying as a candidate for nomination of a political party** for the office of County Superintendent of Education is that the required certificate of administration and supervision be filed with the Probate Judge. The time in which one may qualify as a candidate for nomination of a political party for any office is fixed by the executive committee of the party to be not later than March 1st next preceding the holding of the primary election. In the forthcoming Democratic Primary, the last day was fixed as March 1, 1938, in accordance with Primary Election Law of 1931, (General Acts 1931, p. 73). Therefore, if the required certificate was not filed by that date, the above prerequisites or conditions precedent to qualifying as **a candidate for nomination of a political party for the office of County Superintendent of Education have not been met.**

Section 141 of the School Code of 1927, provides as follows:

"141. BALLOT: MISDEMEANOR TO PRINT NAME OF PERSON WITHOUT CERTIFICATE ON.—Any person securing his name, or the name of another printed on a ballot as a candidate for, or nomination by a political party as a candidate for the office of County Superintendent of Education, without first there having been filed with the Probate Judge as required by law, the certiifcate signed by the State Superintendent of Education that the person whose name is printed on the ballot holds a certificate of administration and supervision, and any officer permitting the printing on a ballot of the name of a person as a candidate for, or nomination by a political party as a candidate for the office of County Superintendent of Education where there has not been filed with the Probate Judge such certificate shall be subject to a penalty of two hundred and fifty dollars, recoverable in the name of the State for the use of any school district first instituting suit therefor. Any resident of the County may institute suit for such recovery for any school district of the County."

In view of Section 141, supra, the name of one who has not complied with Section 140, supra, as above construed, should not be placed in the ballot.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 7, 1938

Hon. William F. Black, Director,
Transportation Bureau,
Alabama Public Service Commission,
Montgomery, Alabama.

Provision of Interstate Commerce Commission requiring insurance policy of common carrier making occasional trip to this State, does not supersede requirements of Alabama laws in reference to insurance policies in such cases.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter requesting my opinion as follows:

"The AB Company, a motor carrier as defined in Motor Carrier Act, 1935, is domiciled in the State of Virginia. Occasionally the AB Company is called upon to deliver a shipment of goods into the State of Alabama, its operations over the highways of Alabama being purely interstate in character. Under Motor Carrier Act, 1935, it is qualified to make trips as that referred to. It has filed or will file with the Interstate Commerce Commission in Washington, D. C., a policy of public liability and property damage insurance written by the CD Company, an insurance company authorized to transact business in the State of Virginia and in several other states, but not qualified to transact business in the State of Alabama. The CD Company, under the rules of the Interstate Commerce Commission, has appointed an attorney in fact in Alabama for accepting service of process.

"Query: Will the filing by the AB Company of the insurance policy written by the CD Company satisfy the requirements of Section 26 of Alabama Contract-Common Carrier Motor Vehicle Act of 1932, assuming the carrier is properly subject to that act, or must the AB Company file a policy issued by some surety or insurance company duly authorized to transact business as such within the State of Alabama?"

I am of the opinion that filing by the AB Company of the insurance policy written by the C. D. Company will not satisfy the requirements of Section 26 of the Alabama Contract-Common Carrier Motor Vehicle Act of 1932. (1932 Acts, page 178, at page 185). Section 26 insofar as it relates to interstate commerce, applies only to persons or property who or which are not being transported interstate. It has long been held that it is an undue burden on Interstate Commerce for a State to attempt to require insurance to protect interstate passengers and cargoes. **Spout v. South Bend**, 72 L. Ed. 833, 277 U. S. 163.

It will be presumed that the said Section 26, therefore applies only to injuries to property of third persons and to injuries to third persons. In the case of **Continental Baking Company v. Woodring**, 76 L. Ed. 1155, 286 U. S. 352, the Supreme Court of the United States accepted the interpretation that the Kansas Motor Vehicle Act of 1931 applies only to third parties. It will be presumed that the legislature of Alabama intended to frame such an Act as is constitutional, and that therefore, Section 26 does not attempt to require insurance for the protection of interstate cargoes and passengers.

When we give Section 26 this interpretation, the question is presented as to whether the Federal regulation and the State regulation can consistently stand together or if there is such a repugnance between them that the State

regulation is superseded. The principle underlying this situation is set forth in the recent case of **Kelly v. State,** 58 Sup. Ct. 87, at page 92, as follows:

> "Under our constitutional system there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases, 230 U. S. 352, 402, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L.R.A. (N.S.) 1151 Ann. Cas. 1916A, 18. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." (Citing numerous cases).

I am of the opinion that the Federal regulation did not intend to deny the State the right to make reasonable regulations for the protection of its citizen (in this connection, see **Railroad Commission of Texas v. South West Greyhound Lines,** 92 S. W. (2d) 296); that Section 26 of Alabama Act, (supra) is not an undue burden on interstate commerce; and that it can consistently stand with the Federal Motor Carrier Act of 1935, (49 U. S. C. A., Section 301). The Alabama Public Service Commission should therefore insist upon conformity to said Section 26 of the Alabama Act.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 7, 1938

Hon. A. H. Collins,
Superintendent of Education,
State Department of Education,
Montgomery, Alabama.

General Acts of 1935, p. 1146. Bidders on Public Improvements—Statute requiring qualification of bidders on contracts awarded by state agencies but excluding any county or municipal officer or Board, excludes contracts awarded by County Board of Education.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 29, 1938, in which you request my opinion as follows:

> "I have today received a letter from Superintendent G. M. Barnett, Superintendent of the Chambers County Public Schools, which reads as follows:

" 'The Chambers County Board of Education, as you know, has sold its Capital Outlay Warrants in the amount of $137,500.00 and plans to begin, at once, a building program.

"There has been brought to the attention of the County Board, Act No. 540, passed by the Legislature in 1935, and approved September 14, 1935, appearing at page 1146 in the General Acts of 1935, and also at page 126 of Department of Education Bulletin, 1936, No. 9.

"This is an Act 'Relating to Regulating and Requiring a Pre-qualification and Classification of Bidders on Public Improvements.' This Act provides a very comprehensive and somewhat complicated scheme for the qualifying of bidders on public improvements, and it seems will be quite burdensome if the County Board of Education is required to conform to all its terms.

"By Section 14 of the Act, it is provided that the requirements of the Act, shall not apply to 'any County or Municipal officer of Board, they being expressly excluded from the operation of this Act.'

"The many requirements of the Act, the evident purpose of the Act and, to our minds, this exclusion in Section 14, indicate that the Act was intended to apply to what are understood by the laymen as being the great state agencies.

"But it has been suggested that a holding of the Supreme Court to the effect that County Boards of Education are state agencies and not county agencies might bring County Boards of Education into the field of operation of this particular Act of the Legislature.

"As I have said above, and as I believe you will feel if you will read this Act, it would put upon the small County Boards of Education a great burden and apparently would require it to prescribe rules and regulations for the qualification of bidders and to provide forms of various kinds, and to sit and pass upon qualifications of persons who expected to bid on contracts. And right at this point, I may point out that by Section 11, parties who apply for qualifications under the Act are permitted to take an appeal from the finding of the awarding authority, and that appeal must be the Circuit Court of Montgomery County, internal evidence, to my mind, supporting the theory that this Act does not apply to County Boards of Education.

"We are ready to let our contracts, and if we have to conform to this Act it will mean considerable delay.

"I am writing to ask, therefore, that you submit to the Attorney General, for his opinion, the question whether the Act of the Legislature that I have identified is applicable to contracts let by County Boards of Education for building of school houses.

"Will you please give me an opinion, at as early a date as convenient, in regard to the inquiry raised in Superintendent Barnett's letter?"

The Act in question (General Acts of 1935, p. 1146) regulates bidders on public improvements and requires rather stringent regulations for the qualification and classification of such bidders. The question here involved is whether under Section 14 of said act, the County Board of Education of Chambers County is "an awarding authority" within the meaning of the act. This Section 14 is as follows:

"Section 14. The term 'person,' in this Act shall include natural persons, partnerships and corporations. The term 'awarding authority' shall

include the State Highway Department, the State Highway Commission of Alabama, the Highway Director of Alabama, the Board of Administration of Alabama, and the chairman of the Board of Administration of Alabama and all the state agencies of the State of Alabama, but shall not include any county or municipal officer or board, they being expressly excluded from the operation of this Act. The term 'public improvement' shall include public buildings, structures, sewers, water works, roads, bridges, underpasses and viaducts, as well as any other improvement to be repaired or constructed or maintained by the awarding authority."

Your inquiry calls for a decision of the question whether the County Board of Education is one of the "state agencies of the State of Alabama" within the meaning of the act or is a "county or municipal officer or Board" expressly excepted from the act. In my opinion, such County Board of Education is not such a state agency as is required by the act to limit and regulate the awarding of contracts.

"The intention of the Legislature, embodied in the statute, is the law. The fundamental rule of construction, to which all other rules are subordinate, is, that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the intention or purpose of the Legislature as expressed in the statute." **Street v. Coe,** 207 Ala. 631, 93 So. 591; **Sunflower Lumber Co. v. Turner Supply Co.,** 158 Ala. 191, 48 So. 510."

In approaching the question of whether a County Board of Education is a state agency of the State of Alabama, or is a county board, I might call to your attention certain decisions of the Supreme Court. In certain instances the Supreme Court has used language to the effect that the County Board of Education is an agency of the state. **Kimmons v. Jefferson County Board,** 204 Ala. 384, 85 So. 774; **Turk v. Monroe County Board,** 131 So. 436; **Greeson Mfg. Co. v. County Board of Education,** 217 Ala. 565, 117 So. 163. In these cases, however, the question was not involved as to whether the County Board of Education came within the definition of the statute such as is here involved, but the question there was whether the County Board was such an agency of the state for the purposes of education as to receive the immunity from suit or exemption from liability commonly accorded such state agencies.

Other cases indicate that for the purposes of our inquiry such County Board of Education should be construed to be a county agency rather than a state agency. In the case of **Hamilton v. Pullman Car Mfg. Co.,** 231 Ala. 7, 163 So. 329, the Supreme Court considered the various constitutional sections and school statutes and there reached the conclusion that an exemption from all taxes except state taxes included an exemption from school taxes, although in a sense such school tax was a state tax.

In **State v. Tuscaloosa County,** 233 Ala. 611, 172 So. 892, the court considered fully the question of the status of the County Board of Education. The court sets out full the various statutes with respect to the County Board of Education and the authorities of such County Board of Education. It was there held that the County Superintendent of Education and the County Treasurer of School Funds were not such county officers within the meaning of Section 749, requiring the county to reimburse the state for the expenses of examiners of accounts making an audit of such offices.

In my opinion, none of these cases is determinative of the question here presented. The case most closely in point with the case here presented is that

of **Daves v. Rain,** 26 Ala. App. 380, 161 So. 107; certiorari denied **Ex parte Board of School Commissioners of Mobile County,** 230 Ala. 304, 161 So. 108. The question was there presented as to whether the County Board of Education came within the statutory and constitutional provisions with respect to a garnishment so as to be exempt from such garnishment as an agency of the state. The court, after considering its previous opinions, including those above cited, said:

> "It is therefore concluded that the word 'state' as employed in the statute was intended for the protection of 'immediate and strict governmental agencies of the state, as its State Board of administration, State Docks Commission, Alabama Polytechnic Institute, University of Alabama, the State Insane Hospital and other mere governmental agencies'."

In my opinion the same conclusion should be reached in the instant case. It seems a fair construction of the entire statute requires the conclusion that the words "state agency" as used in said act, and particularly Section 14 thereof, were those centralized and strict governmental agencies of the state of the same character as those particularly named, that is, the State Highway Department and the Board of Administration, and that the words "county * * * board" included the County Board of Education, although for certain purposes such County Board of Education is not strictly a branch of the county but is for some purpose an agency of the state.

In reaching this conclusion I have been governed somewhat by subsidiary rules for statutory construction and for reaching the intent of the Legislature. Among these is the rule that the inclusion of specific subject, followed by a more general term, limits the general term to things of the same kind or **ejusdem** generis with those specifically named. This would indicate that the words "state agencies" should be limited to those of the same nature as those specifically named, to-wit, the State Highway Department, etc. It is also a general rule of statutory construction that, unless otherwise shown, words should be accorded their common everyday meaning and it is, I think, a matter of common knowledge that the County Board of Education is commonly considered as a county board. Although its authority is derived directly from the state, it has territorial jurisdiction coexistent with the county, and its members are elected by the county. To that extent certainly it should be considered a county board.

I find certain other indications in the act that the County Board of Education should not be included as one of the state agencies referred to. Section 5 requires the deposit of a certified check payable to the State of Alabama and the forfeit of the same to the State. This strengthens the conclusion above reached that the words "state agencies" refer to such immediate agencies of the state, for it would hardly be considered that the Legislature would order a forfeit direct to the state on an amount deposited to secure proper performance of a contract with a County Board of Education.

Section 5 and subsequent sections require the awarding authority to consider whether the acceptance of the particular bid will be "for the best interest of the state."

Section 8 requires an investigation by the awarding authority as to the financial status of the bidder and the granting of a certificate of qualification.

Section 9 requires that the awarding authority may in its discretion make public from time to time a list of qualified bidders. These requirements indicate that the awarding authorities referred to were those authorities such as the State Highway Department and the State Board of Admin-

istration, which continutlly have contracts to award, rather than a County Board of Education which would only have the awarding of a very occasional contract for construction of a school. To further sustain this conclusion, if any such further sustenance were needed, I call your attention to the last sentence of Section 14:

> "The term 'public improvement' shall include public building, structures, sewers, waterworks, roads, bridges, underpasses and viaducts as well as any other improvement to be repaired or constructed or maintained by the awarding authority."

You will note that the word "school" is not included in this list of public improvements. Under the correct application of the maxim **inclusio unius est exclusio alterius,** I must reach the conclusion that by reason of the omission of the word "schools," the Legislature did not intend the statute requiring the qualification of bidders to apply to the awarding of contracts for schools by a County Board of Education.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 7, 1938

Hon. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

County Board of Health—Permit to practice midwifery limited to county where same is issued.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

> "Section 1064 of the Code of 1923 as amended by the Legislature of 1935 (page 929, General Acts, 1935) provides that 'it shall be unlawful for any person other than a regularly licensed physician to practice as a midwife without first making written application for and receiving a permit to practice midwifery from the county board of health.'
>
> "Each county has a board of health, acting under the supervision of the State Board of Health."

You request my opinion as follows:

> Is a permit granted by a county board of health valid only in the county in which it is issued?

In my opinion your question should be answered in the affirmative. From a careful study of Section 1064 of the 1923 Code as amended, it is my opinion that it was the intention of the Legislature to restrict the practice of midwifery to the county where the permit was granted so as to secure a direct supervision over said practice by the county board of health granting said permit.

Section 1064 of the 1923 Code of Alabama, as amended, provides in part as follows:

"Section 1064. PRACTICE OF MIDWIFERY REGULATED. — (1) It shall be unlawful, for any person, other than a regularly licensed physician, to practice as a midwife without first making written application for and receiving a permit to practice midwifery from the county board of health. * * *"

The fundamenal rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute.—**Street v. Cloe,** 207 Ala. 631, 93 So. 591; **Tate v. Cody-Henderson Co.** 11 Ala. App. 350, 66 So. 837.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 7, 1938

Hon. Matt A. Boykin,
Probate Judge,
Mobile County,
Mobile, Alabama.

Homesteads.—If property, exempt as homestead from 1937 taxes, is sold for 1936 taxes, the Judge of Probate should collect only the actual taxes due for 1937, i. e., total taxes minus homestead exemption.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of February 4, 1938, which is as follows:

"On June 22, 1937, a certificate of credit on 1937 taxes, under Homestead Exemption Act No. 107, was issued in the name of Alma L. Borden by Mr. H. M. Touart, our Tax Assessor, to Mr. R. E. King, Collector. At this time the 1936 taxes on the property in question were not paid, but the land had not yet been sold for taxes. On July 20, 1937, the tax sale took place, and the property was bid in by the State for the 1936 taxes.

"Recently the aforesaid Alma L. Borden requested from us an application to redeem her property and we accordingly supplied the figures, including on the application the 1936 and 1937 taxes, based on assessments supplied by the Tax Assessor. Yesterday she submitted the application to us for redemption, tendering at the same time her credit certificate, the amount of which she demanded that we deduct from the total of the redemption.

"Under the circumstances we should appreciate your advice on the following points:

"(1) Are we authorized under the pending laws to accept Alma L. Borden's credit certificate and deduct its amount from the 1937 taxes charged on her redemption?

"(2) If the above is answered in the affirmative, will it be necessary for Mr. King, the Tax Collector, to endorse the certificate to Matt A. Boykin, Judge of Probate?"

From the facts outlined in your letter, title to the property in question did not vest in the State of Alabama until July, 1937. If Alma Borden owned and occupied the property as a homestead on October 1, 1936, her certificate of exemption dated June 22, 1937, is valid. **Quarterly Reports of the Attorney General,** Vol. IX, p. 127.

In answer to your first inquiry, I am of the opinion that you, as Probate Judge, should collect from Mrs. Borden the original amount of the 1937 taxes less the homestead exemption credit.

Section 269 of the 1935 Revenue Code of Alabama provides in part as follows:

"(b) Upon application to the Probate Judge to redeem land, where the same has been sold to the State for taxes, which application shall be made on blank forms furnished by the State Land Commissioner, **the probate judge shall submit such application to the Tax Assessor** of the County in which the land sought to be redeemed is located and the assessor shall, without delay, enter on such application an assessment value for each of the years for which taxes are due, subsequent to the year for which such land was sold to the State for taxes, * * *"

From the above it seems clear that when a taxpayer seeks to redeem, the tax assessor should list only the actual taxes due, i. e., the total amount minus the exemption allowed, rather than the total amount, and the Probate Judge should collect this amount in cash.

The homestead exemption claimed by Mrs. Borden was noted on the assessment sheet of the tax assessor at the time she claimed exemption, and consequently when the tax assessor entered on the redemption form, the amount of taxes due for 1937, he should have entered the original amount less the homestead exemption.

In view of my answer to your first inquiry, an answer to your second inquiry is not necessary.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 11, 1938

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

1. Chilton County Road Supervisor—Local Act of 1936, page 4—Court of County Commissioners has no authority to make additional appropriation for roads after expiration of period for which appropriation is made.

2. Appropriations made by Court of County Commissioners for expenditure on roads and bridges pursuant to Local Act of 1936

(Local Acts 1936, page 4) include amounts to be expended both for material and labor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of February 18th in which you request my opinion as follows:

"I would like to have your opinion in regard to a question that has arisen relative to the Local Supervisor's Bill for Chilton County. Section 8 of said Supervisor law, which is found in Extra-session 1936, at page 4, provides that the Court of County Commissioners shall make appropriations for each quarter of funds which shall be available for the purpose of building, maintaining and constructing the public roads of the county for three months. In the quarter commencing November and ending January, the Court of County Commissioners appropriated a certain amount of money which was expended on the roads and bridges of the county by the supervisor and the supervisor during this period of time spend some $3,500.00 more than was appropriated. You will notice that in said Section that the Commissioners Court is authorized from time to time 'within this period' to increase the amount so allowed.

"The question I would like to know is, the quarter having expired, whether or not the Court of County Commissioners can now make an additional appropriation to take care of this excess of $3,500.00 expended for labor and materials during said quarter? In other words, whether or not the increased appropriations would have to be made during the quarter or whether the order can be made after the expiration of the quarter. I will appreciate your giving me your opinion on this at your earliest opportunity. I would like to refer you to your opinion construing this same Act to J. Lee Smith, Judge of Probate of May 11, 1937, which is stated in your Quarterly Opinions Volume 7, for the period of April 1, 1937 through June 30, 1937.

"There is also another question on which I would like to have your opinion. The Court of County Commissioners has construed the law to mean that the appropriations so made by the Court for the quarter, included both material, supplies and labor, that is, the appropriations made by the Court has been construed by them to mean funds to be expended on the roads and bridges of the County whether for material or labor. However, I am informed that it is the Supervisor's contention that the appropriations include only labor under the terms of the Act, and I would like to have your opinion as to whether or not it is the intent of said Act that the appropriations includes both material and labor or only for labor."

It is my understanding from you that for the quarter commencing November, 1937, and ending January 31, 1938, the Court of County Commissioners of Chilton County appropriated the sum of $14,000. During this quarter this appropriation was increased by an additional amount of $4,000. After the expiration of the quarter additional claims were filed with the Court of County Commissioners in excess of the total appropriation for road and bridge purposes during that quarter.

1. Your first question is whether under the bill regulating the road supervisor for Chilton County (Local Act of 1936, page 4) the Commissioners Court may again increase the appropriation by an additional appropriation after the expiration of the quarter. In my opinion the Commissioners Court does not have this authority.

Under the express terms of Section 8 of the Act referred to, the authority of the road supervisor is limited to the expenditure of such funds as may be set aside and appropriated by the Commissioners Court for each quarter. The Commissioners Court is required to determine the amount of of funds available for the purpose of road work within one month preceding the first Monday of each quarter and make an appropriation for that amount, which amount must not be exceeded by the road supervisor during that quarter. The Commissioners Court is given authority from time to time to increase the amount so allowed to be expended during any such period, but this authority is expressly limited to action "within any such period."

I realize, of course, that under certain circumstances the express letter of the law may be tempered by the spirit thereof. The basic rule of statutory construction is to reach the intention of the Legislature. However, although the strict letter of the law is not allowed to defeat an otherwise clear intention, to justify a departure from the plain language of the statute there must be a moral conviction that the Legislature could not have intended such a result. **Board of Revenue v. McDanal,** 105 So. 191, 213 Ala. 349.

We may in construing the statute consider the evils intended to be remedied. **Richardson Lumber Company v. Howell,** 219 Ala. 328, 122 So. 343; **Abramson v. Hard,** 229 Ala. 2, 155 So. 590.

A consideration of the evils sought to be remedied and the effect or the result reached by such construction strengthen the conclusion reached from the literal meaning of the words "within any such period." The Legislature in this Act has evinced a purpose to regulate the amount expended for road and bridge purposes in Chilton County to such amount as the Commissioners Court determines is available for that purpose during the particular quarter. It is evident that this Act is another of a long series of acts designed to aid counties in living within their income. Under the express provisions of Section 9 of the Act no funds of the county shall be expended or liability created against the county for road purposes in any manner other than provided by the terms of the Act. If a construction were adopted which permitted the Court of Commissioners to appropriate funds after the end of a quarter to meet an expenditure of funds over and above the original appropriation for that quarter, the entire purpose and effect of the Act would be avoided. The limitation placed upon the expenditure of funds by Section 8 of the Act would be meaningless and without force if the Court of Commissioners could be faced with a so-called moral obligations to make further appropriation for claims in excess of the appropriation.

The Commissioners Court has no inherent or constitutional powers. Whatever power it has must be derived from statutory enactment. If there is no statute or construction of a statute authorizing the payment of a claim, it cannot be paid. **Weakley, et al v. Henry County Treasurer,** 86 So. 46; **Mobile County v. Williams,** 180 Ala. 639. By the express terms of Section 9 of the statute those claims or obligations incurred by the road supervisor for Chilton County in excess of the amount appropriated for road purposes do not constitue a liability against the county. If the Court of County Commissioners were permitted to make an additional appropriation after the end of the quarter to take care of this deficit during the preceding quarter, we would permit the county to do by indirection what it could not do by direction, that is, to pay a claim which is not a liability against the county. These considerations, as you see, are not in conflict with, but support the conclusion reached from the strict letter of the statute and it is, therefore, my conclusion that the Court of Commissioners of Chilton County has no authority to make any appropriation for road purposes to cover the amounts expended during the preceding quarter.

2. Your second question is whether or not the appropriation made by the Court of County Commissioners includes amounts to be expended both for material and labor, or only for labor. It is my opinion that in providing for such appropriations as is done in Section 8 of the Act, the Legislature intended such appropriations to include appropriations both for labor and for materials. It is true that under Section 5 of the Act the materials, machinery, etc., are purchased by the Court of County Commissioners after requisition filed by the road supervisor. However, these provisions of Section 5 do not purport to affect the amounts to be appropriated or the purposes for which the appropriation may be spent. Under the provision of Section 8 the Commissioners Court of Chilton County must fix and determine the amount of funds available "for the purpose of building, maintaining, and constructing the public roads of Chilton County." The law expressly provides that the amount so appropriated shall not be exceeded by the road supervisor in constructing, maintaining or repairing the public roads. The clear purpose of these provisions, as set out above, is to prohibit the county or the road supervisor from expending on the public roads an amount more than that available for those purposes. If a construction was adopted that the appropriations referred to in Section 8 of the Act included only labor, then the county would be expending for labor on roads the entire amount available for road purposes and would have to pay for machinery, equipment and supplies to be used on the roads from other sources. This would materially affect the Court of County Commissioners in making the appropriations for road purposes, for in setting the amounts available for labor purposes, they would necessarily have to take into consideration the amounts to be expended for materials. Such irrational construction should not be adopted unless there is clear and unambiguous language requiring such a construction. I find no such language.

In my opinion, therefore, the appropriation of sums for the purposes named in Section 8 of the Act include all sums to be expended for those purposes, whether the same are expended for labor or for materials.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

April 11, 1938

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Officers—One, elected as a member of a County Board of Education, and serving as such, who was not a qualified elector of the county at the time of said election is only a de facto officer. His acts as such de facto officer are valid and binding. There existed a legal vacancy from the beginning of the term to which he was elected although there was no physical vacancy, and said legal vacancy could be filled by proper appointment under the provisions of Section 88 of the School Code of 1927.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 14, 1938, which is as follows:

"I have today received from Mr. Luther E. Little, Superintendent of Chilton County Schools, a letter which reads in part as follows:

" 'In the November election of 1934 Mr. J. P. Payne was elected as a members of the Chilton County Board of Education and has served since that date. The following facts have recently been discovered which places Mr. Payne in a questionable status as to his serving as a member of the Board of Education. Mr. Payne first registered in Chilton County on November 22, 1915. He later moved to Elmore County and registered there on January 5, 1918. Mr. Payne then moved back to Chilton County in January 1921 but has not reregistered in Chilton County since he registered in Elmore County on the above given date. Please advise me as to the following:

" '1. Is Mr. Payne legally a member of the County Board of Education?

" '2. If your answer is in the negative to question No. 1, are the acts of Mr. Payne since he has served on this Board legal?

" '3. If Mr. Payne cannot serve for the remainder of his term by reason of his being a disqualified elector does a vacancy exist on this Board of Education?

" '4. If a vacancy exists on the Board of Education when did such vacancy occur?

" '5 If a vacancy exists on said Board of Education shall the Chilton Board of Education or the State Superintendent of Education fill the vacancy?' "

There is no doubt that a member of a County Board of Education is a public officer holding office under the authority of the State. **Mechem on Public Officers, Section 55; Draper v. State,** 175 Ala. 547. A. qualified elector under the laws of this State is one who has legally registered, paid all poll taxes due and is a bona fide resident of the State for not less than two years, the county for not less than twelve months and the precinct for not less than three months. (See Section 184 and 186 of the Constitution of 1901).

This office in an opinion found in Biennial Report of Attorney General, 1930-1932, p. 705, held that one who is a bona fide and qualified elector of a county, who moves away from that county to another county, registers and pays poll tax and votes in the latter county, loses his residence in the county from which he has moved. In order to again acquire the right to vote and therefore be a qualified elector in the county in which he first lived, registered and voted, he must not only move back to that county with the intention of making it his actual home, but he must again register there, pay his poll tax there, and maintain an unchanged bona fide residence for at lease twelve months before he can vote.

The registration law being found to be a valid enactment, it follows that, unless excused by some fact which the law itself deems sufficient, the voter must register if he would exercise his privilege. The fact that he is qualified must be evidenced by the proper registration, and where it is not so evidenced, the failure must, where the opportunity for registration is afforded, be attributed to the voter's own fault or neglect—**Mechem on Public Officers, Section 154.**

It, therefore, follows that registration is a prerequisite to the right to vote. In your case, Mr. Payne is not a qualified elector since he did not

register in Chilton County when he returned in January, 1921, or thereafter. —**Shepherd v. Sartain,** 185 Ala. 439. He was ineligible for election to the office in question in view of the fact that he did not reregister in Chilton County.

In view of the fact that he assumed the duties of the office by virture of the election in question, he is a de facto officer and his acts as such are valid and binding.—**Section 2583, Code of Alabama, 1923;** 46 Corpus Juris, 1056; **Conner v. State,** 212 Ala. 360; **Cary v. State,** 76 Ala. 78.

The question then presents itself as to the status of the office in question. We have a situation where one was elected to an office who was ineligible to said office and has assumed said office in the capacity of a de facto officer. In my judgment, there is and has been a legal vacancy in said office from the beginning of the term in question although the office has been physically occupied. The general rule as stated in 22 Ruling Case Law, p. 438, is as follows:

> "An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, **conversely, it is vacant in the eye of the law when it is not occupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. A vacancy may occur so as to permit the appointing or electing power to appoint or elect some person to the office, although the incumbent continues physically to occupy it and has the right to do so until the qualification of his successor."** (Italics supplied).

Our Supreme Court in the case of Baker v. Conway, 214 Alabama 358, held that a county superintendent of education who legally assumed office, but later moved from the county, ipso facto, vacates the office and the proper authorized appointing power was then and there vested with the right to fill the vacancy. In line with this holding, our Supreme Court, in the case of State v. Rice, 230 Ala. 608, further held that in the case where an officer who failed to make the proper bond within the time required by law, the appointing power, ipso facto, could fill the vacancy by proper appointment. Also, the general rule in respect to holdovers is that the person holding over after expiration of the official term, pending qualification of a successor, may be a de facto officer but nevertheless the office is vacant as to the **new term.—State v. Amos,** 101 Fla. 114, 133 So. 623.

The premises considered, it is my opinion that one who assumes office though not legally qualified should be in no better position than one who assumed office and was qualified at the time and later became disqualified as in the case of the holdover, or a removal of residence. The instant case is analogous to the theory set out in the Rice case, supra, for failing to make the proper bond within the time required by law. Although the person not qualified may assume the office as a de facto officer, yet, in my opinion, the proper appointing power may at any time fill the legal vacancy existing although the office may be physically filled. There is a distinction between a **legal vacancy** and a **physical vacancy.**

There being a legal vacancy in the office in question from the beginning of the term of said office, said vacancy could have at any time after that date been filled under the provisions of Section 88 of the School Code of 1927.

> "Section 88. Vacancy in County Board Membership.—In the event a vacancy occurs in the office of members of the County Board of Edu-

cation, the vacancy shall be filled by appointment by a majority of the remaining members of the County Board of Education, and the appointee shall hold for the unexpired term. In the event the vacancy is not filled by the remaining members of the County Board within thirty days, the State Superintendent of Education shall fill such vacancy, by appointment. The County Superintendent of Education shall notify the State Superintendent of Education when a vacancy in the office of a member of the County Board of Education has not been filled within thirty days."

It seems that thirty days have elapsed since the legal vacancy occurred in the office in question, therefore, appointment should be made by the State Superintendent of Education. This is true regardless of when the disqualification was discovered. As above stated, the legal vacancy existed from the beginning of the term although the office was physically filled.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 25, 1938

Mrs. Sarah E. Sossaman,
Chairman, Board of Registrars,
Mobile County,
Mobile, Alabama.

Elections—Voters.

1. Board of Registrars should transfer names of electors from one precinct to another at any time said Board is in session, upon sufficient evidence being presented to said Board that said names should be so transferred.

2. No notice provided to be given electors whose names must be transferred by Board of Registrars from one precinct to another.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter under date of April 18, 1938, in which you request my opinion as follows:

"The Acts of 1935 p. 981 fixes the time when the Board of Registrars in Counties of a population of not less than 100,000 and not more than 300,000 shall sit for the purpose of registering voters and purging the registration list.

"The Acts of 1935 p. 989 provides that when the Board of Registrars have sufficient evidence furnished them that any elector has permanently moved from one precinct to another in any county, said Board of Registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved.

"It is rumored that there are several thousand voters in this county who do not reside in the ward or precinct where their names appear on the Registration list.

"1. Should these transfers be made by the Board of Registrars of Mobile County during the time fixed for purging the Registration list or during the time for Registering voters?

"The Acts are silent as to the time this should be done, and it has heretofore been the custom of the Board to transfer voters from one ward or precinct to another during the session for registering voters.

"2. Where evidence is furnished to the Board that an elector has permanently moved from one precinct to another what notice if any should be given to the elector before his name is transferred?

"If the Board is required to make transfers during the purging session it will likely consume the time of the Board and leave little time to purge the voting list."

In reply to your first inquiry, I wish to refer you to an opinion of the Attorney General addressed to Hon. Sidney J. Gray, Member, Mobile County Board of Registrars, Mobile, Alabama, under date of June 24, 1936, and reported in the Quarterly Report, opinion of the Attorney General, Vol. 3, page 197. I wish to particularly call your attention to the following paragraph found in said opinion:

"You ask specifically when the Board of Registrars may transfer the name of any elector in accordance with the mandate contained in the Acts of 1935, page 989, supra. In my opinion, this transfer may be made at any time the Board is in session upon the presentation of sufficient evidence in accordance with the provision of the above named act. You will note that the law specifies no certain session of the Board of Registrars at which this action must be taken."

In reply to your second question, I wish to advise you that I find no provision of law requiring notice to be given by the Board of Registrars to an elector that his name will be transferred from one precinct to another before said transfer is made by said Board.

However, a judicial determination such as this, without notice to the party affected thereby, should be avoided if possible. To this end, the practice of giving to a person whose name is to be transferred from one precinct or ward to another the same notice required by law to be given to a person whose name is to be purged from the list of qualified electors, would seem to be good practice and certainly would not be objectionable. However, as stated above, no notice is required by law to be given in such a case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 25, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
CAPITOL.

Licenses—The exemption provided for in subsection (k) (3) of Schedule 147 of Section 348 of the Revenue Act of 1935, as to transient dealers in the sale and delivery of petroleum products applies only when same are drawn, conveyed and distributed from stock maintained at a warehouse, oil depot, distributing station or established

place of business in this State upon which has been paid all the privilege taxes required of such business.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of a letter of February 24, 1938, signed by Mr. Harry Simon, Chief Clerk, Privilege License Department, which is as follows:

"Under this schedule there is levied a license on each person doing business as a transient dealer as defined in said schedule, which business is engaged in the instant case by the petroleum companies, but who are exempted under subsection (k) (3), if such transient dealers are engaged in the sale or delivery of such petroleum products drawn, conveyed and distributed from a stock maintained at a warehouse, oil depot, distributing station or established place of business **in this State** (emphasis supplied) upon which has been paid all the privilege taxes required of such business.

"The distributors of petroleum products upon whose liability we desire your official opinion, maintain their warehouse, oil depot or distribution station, from which said petroleum products are sold or delivered, in a border state and without the state of Alabama.

"There is no controversy as to whether or not these persons are conducting their business in a manner which would classify them as 'transient dealers' under our statutes. Being engaged in the business of transient dealers, is there any provision under our statutes that would exempt these petroleum companies operating from an adjacent state?"

I am of the opinion that your inquiry should be answered in the negative.

Schedule 147 of Section 348 of the Revenue Act of 1935, imposes a license on transient dealers. Subsection (k) (3) of said schedule provides in part as follows:

"(k) Provided this schedule shall not apply to *** ; (3) nor shall it apply to transient dealers in the sale or delivery of gasoline, kerosene, lubricating oil or other petroleum products when drawn, conveyed and distributed from a stock maintained at a warehouse, oil depot, distributing station or established place of business in this State upon which has been paid all the privilege taxes required of such business. ***"

It will be seen from the above that the exemption is applicable only when the products are drawn, conveyed and distributed from a stock maintained at a warehouse, oil depot, distributing station or established place of business **in this State upon which has been paid all the privilege taxes required of such business.** Exemptions must be strictly construed. In my opinion, where the dealer has an established place of business without the State exemption would not be applicable. The statute requires that the business be in this State and all privilege taxes required on such business should have been paid.

In your letter you state that there is no controversy as to whether or not the persons in question are conducting the business in a manner which would classify them as "transient dealers."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 25, 1938

Hon. Gaston Scott, President,
State Highway Commission,
Capitol.

Highways—Highway Department—

State Highway Department has a right to enter private property for the purpose of making a preliminary survey for road construction without being liable for tresspass.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion on the following:

"On Project S-24-Washington County, the Department has been making a survey for the purpose of constructing a new highway. On reaching the property of J. F. Garris, our Survey Party was halted and refused permission by the said Mr. Garris to proceed with the survey on his property.

"We are anxious to proceed and have failed to obtain the necessary permission from Mr. Garris. This refusal was in January and the survey has been held up since that time.

"Please advise what steps must be taken to secure this permission and if necessary institute the legal proceedings you may deem proper."

An answer to your question involves a discussion of the incidents to the right of eminent domain on the part of the State. The right of eminent domain is an attribute of Sovereignty and unlimited except as provided in the State or Federal Constitutions. **Denson v. Alabama Polytechnic Institute,** 220 Ala. 433. The limitations contained in the Constitution of the State of Alabama is that private property shall not be taken for public purposes without just compensation. **Section 23, Constitution.**

Further, under **Section 235 of the Constitution,** this right of eminent domain may be delegated to corporations, municipal or otherwise and to individuals.

By Section 7016 of the Code of Alabama, certain public utility corporations are given the right to exercise the power of eminent domain and by Section 7027, they are given the right to make surveys for the proposed exercise of the right of eminent domain which is a condemnation proceeding. The only limitation contained is that they shall be subject to liability for all damages done in the act of making an examination or a survey.

The right of eminent domain is an inherent right and therefore it is my opinion that the legislature in granting by Section 7027 of the Code the right of making examinations and surveys to public utility corporations, granted to them an incident of the right of eminent domain which the state already has, and a power which the state has a right to exercise. In considering this statute the Supreme Court said:

"It is manifest from the plain terms employed in the statute as well as from the purpose it would subserve and effect that the rights therein conferred are predicated of the soverign power to take, to injure, or to destroy the property of others through its appropriation and devot-

ion to a public use." **Dancy v. Alabama Power Company,** 198 Ala. 504. Cited with approval in **Birmingham Iron Company vs. Allied Engineers,** 225 Ala. 522.

Further, in **Alabama Interstate Power Co. v. Mt. Vernon-Woodberrt Cotton Duck Co.,** et al, 186 Ala. 622, it was said in reference to Section 7027 of the Code of Alabama:

"The temporary right, and consequent limited immunity (State v. Simons, 145 Ala. 95, 40 South, 662), conferred by this statute, is necessarily incident to, and preliminary of authorized proceedings to condemn, instituted by the entities mentioned therein. Manifestly, the right thereby established is not conditioned—otherwise than upon an authoritative prerogative to exercise the power of eminent domain—upon any other contigency than that the corporations mentioned shall have in contemplation proceedings to exercise the rights and powers to condemn. The obvious purpose of the statute was to allow preparatory, preliminary investigations and surveys in order to properly prepare for, and to intelligently invoke, condemnation proceedings. The right conferred is valuable and essential to the object it has in view."

An interpretation of the above cited cases gives rise to the conclusion that since the state has the power to permit public utility corporations the right to exercise this power of making a preliminary examination and survey, the State surely in its inherent power retains this right on its own behalf or by its instrumentalities. By Laws of 1935, p. 773, the State Highway Department by its employees is given the right "to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and maintain roads and bridges of this state;" So that the State Highway Department as an agency of the State has the right in my opinion to enter upon private property to make surveys or examinations for the purpose of laying out or planning contemplated highway constructions.

Further, it is my opinion that the State would not be liable for any trespass in this situation since there is an implied license in the law to commit this trespass nor would the employees of the State Highway Department be liable for a prosecution for tresspass under Section 5554 of the Code of Alabama, 1923, **State v. Simons,** 145 Ala. 95.

Should Mr. J. F. Garris continue to refuse permission to make the survey after discussing with him the opinion of this office herein, proceedings should be instituted in a court of competent jurisdiction to secure an injunction restraining Mr. Garris from interfering with the proper work of your department in this matter.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 25, 1938

Hon. H. A. Terry,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Absentee ballots—May be tabulated by the election officials of the absentee ballot box as soon as they are received by them from the person authorized to deliver the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 11, 1938, which follows:

"There has been a common practice in this County with reference to handling the absentee ballot box. The practice referred to is that the officials appointed to this box would meet and as soon as the polls were open they would proceed to open these envelopes which contained the absentee voter's ballot and tally the same.

"My contention is that these envelopes should not be opened or tallied until after the polls closed just as any other ballot box.

"I would appreciate your opinion at an early date on the above."

The present law of this state governing and regulating the voting, handling and tabulating of absentee ballots is Act No. 178, General Acts, 1933, page 193, approved April 19, 1933. Section 6 of this Act provides in part as follows:

"On the date of any general, special, or municipal election, **as soon as the polls are open,** the Judge of Probate, or person acting in his stead in the case of general or special elections, or the chairman of the political party holding the primary, or person acting in this stead in the case of primaries, or the mayor or other chief executive officer or person acting in his stead in the case of municpal elections, shall deliver all absentee ballots received to the election officers appointed under section 5 of this Act." (Emphasis ours).

while Section 5 provides:

"In addition to the managers and clerks now provided under the laws of this state for elections, there shall be, for all future elections, whether primary, general, special, or municipal, appointed at the same time and in the same manner by the appointing board of the county or city, three managers, two clerks, and a returning officer, who shall meet in the office of the Judge of Probate of the county, (or, except in the case of municpal elections, in a place to be designated by the appointing board) on the day of said election and remain, as officers at other polling places, for the purpose of receiving the ballots of absentee voters from the Judge of Probate, or other person authorized to handle them, as provided herein. The absentee ballots cast as provided by law shall be, by said election officers specified in this section, tabulated separately by precincts, and returns thereof made as now provided by the laws governing the conduct of elections. The managers, clerks, and returning officer provided for in this section shall be governed in all respects in the performance of their duties by the laws governing all elections, and shall be subject to the same penalties as other election officers. **Provided, however, that the officers appointed under the provisions of this section may begin tabulating said absentee ballots as soon as they are received by them from the person authorized to deliver same.** Provided further, that this section shall not apply to municipal elections in cities and towns whose population is less than 10,000 inhabitants." (Emphasis ours).

It is true that ballots generally cannot be counted until after the polls are closed on election day, in both general and primary elections. Section 503 of the Code of Alabama of 1923, governing the counting of votes in general elections, provided as follows:

"All inspectors of elections in the election precinct shall, immediately on the closing of the polls, count the votes polled, and no votes shall be counted until the polls are closed";

while Section 25 of Act No. 56, General Acts, 1931, page 73, approved February 25, 1931, generally known as the 1931 Primary Law reads:

"At the close of the primary election at each polling place and nowhere else, the inspectors and clerks, shall proceed forthwith without adjournment, in the manner provided by law in the case of general elections, to count the vote.";

and Section 26 of said act provides in part:

"No ballot shall be counted until the polls are closed. * * *"

However, it is my opinion that the above quoted provisions of the 1933 Act governing absentee ballots make an exception to this rule as to the counting of ballots generally. As can be seen, the absentee ballots must be delivered to the officials of the absentee ballot box "as soon as the polls are open"' and said officers "may begin tabulating said absentee ballots as soon as they are received by them from the person authorized to deliver same." These provisions are plain, clear and unambiguous. They provide an exception, in regard to the counting or tabulating of absentee ballots, as to the time when the same may be tabulated, to the law in regard to the counting or tabulating of ballots generally, as stated in Section 503, supra, for general elections and Sections 25 and 26 of the 1931 Primary Act, supra, for primary elections. Special provisions relating to specific subjects control general provisions relating to general subjects, and things specially treated will be considered as exceptions to general provisions. **Herring v. Griffin**, 211 Ala. 225, 100 So. 202. This conclusion is strengthened by the fact that the 1933 Act is the last expression of legislative will on this subject, both the provisions of the Code of Alabama of 1923 and of the 1931 Primary Act being earlier enactments. It is a well known rule that the last expression of legislative will prevails.

The premises considered, it is my opinion that the officials of the absentee ballot box may proceed, as soon as they receive the ballots from the person authorized to deliver the same to them, to tabulate said absentee ballots, and that they do not have to wait after the polls are closed to begin this tabulation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 25, 1938

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama

County authorized to legally discharge lien, for special paving assessment on property purchased by it for bridge abutment, by payment from general fund.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request by opinion as follows:

"In 1929, the County of Elmore brought from the owner a parcel of land on the west side of the Coosa River for the abutment of the concrete bridge across said river. The bridge was constructed as per plans and the west end now rests on part of said lot. In 1926, the Town of Wetumpka pursuant to Section 2176 et seq. of the Code of 1923, paved the street in front of said lot and assessed the cost of the improvement against the property. The annual installments of the assessments had been taken care of up to the time of the purchase by the county, but the remainder of the ten annual payments have not been met. Bonds were issued by the town pledging the assessments against all property on the street in question and these matured January 1, 1936. The balance of bonds remaining unpaid were taken care of by issuance of refunding bonds and these pledged as security all unpaid assessments. Until about a year or more ago, the town had not made any formal claim against the county for the unpaid assessments against the above mentioned property. The authorities of the town are making demand on the county for the payment of these unpaid assessments against the property which the county purchased and contend that it has a lien on it under and by virture of Sec. 2199 of the Code of 1923. So far as I am able to determine and am advised, this property was subject to the lien prescribed by said code section. If the property is subject to a lien the county wants to discharge it if it can legally do so.

"Please let me have your opinion on the following questions:

"1. Assuming that the proceedings relating to the assessment constituted a lien under Code Sec. 2199, does that lien still exist where the property passed by conveyance to the county?

"2. If the first question is answered in the affirmative, can the county legally discharge the lien payment to the Town of Wetumpka?

"3. Can it be paid from the general fund?"

In my opinion, the lien for the special assessment inquired about still exisits on the property conveyed to the county as detailed in your inquiry. Section 2199 of the Code of Alabama of 1923 provides in part as follows:

"2199. Fixing amount of assesment constitutes liens; superiority of such liens—At such meeting or any adjourned meeting the council shall proceed by order or resolution to fix the amount of the assessment against each lot or tract of land described and included in said assessment roll, and **all such assessments from the date of such order or resolution, shall be and constitute a lien on the respective lots or parcels of land upon which they are levied superior to all other liens, except those of the state and county for taxes.** ***"

The lien created by the foregoing section is superior to all other liens except that of the State and county for taxes. The mere fact that the county brought the property would not operate to destroy that lien, otherwise a municipal corporation might, in a large number of cases, be deprived of the security for payment of legal assessments for public improvements and its securities made less valuable. I find no provision of law, statutory or otherwise, which renders the county's position different from that of any other purchaser buying property subject to a valid lien created by law or contract.

It is my further opinion that the county may legally discharge the lien in question by payment of the amount due to the Town of Wetumpka. While there is no contractual obligation between the town and county to pay off the lien outlined in your inquiry, the county can legally free its property of such lien by payment. **Smith v. Franklin County,** 221 Ala. 136, 127 So. 904, and cases therein cited. The question of the ultimate bearing of the burder is one to be settled between the county, as the purchaser, and the vendor of the property who conveyed such property impressed with the lien. The latter question depends for solution upon the contract between the vendor and the county at the time of the sale. The town is not, so far as appears from your inquiry, concerned therewith, since it has the right to look to the property itself for the assessment.

Answering your third inquiry as to the fund from which this payment may be made, I wish to advise that such payment may be made either from the general fund (Quarterly Report of the Attorney General, Vol. 4, page 106), or from the road and bridge fund, or from the gasoline fund (Quarterly Report of the Attorney General, Vol. 2, page 82).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 25, 1938

Hon. John A. Williams,
Circuit Clerk,
Chambers County,
LaFayette, Alabama.

Elections—Where first primary of a special primary election is called on date of second primary (run-off) of regular primary election, the special primary election and regular primary election should be treated separately and the election officials appointed accordingly.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 11, 1938, which is as follows:

"Please give me your official opinion at the earliest possible date on the law applicable to the following facts:

"A short time ago Hon. W. C. Batson, Judge of Probate of this County died. Mrs. Lily C. Hines was appointed by the Governor to serve as Probate Judge until the next General election. A Special Democratic Primary election has been called for the purpose of electing the Democratic nominee for this office to be filled in the January election in November for June 14, 1938 and July 19, 1938.

"You will note that the date of the first Primary for this Special election is on the same date as the regularly scheduled second primary. The incumbent Sheriff is a candidate to succeed himself (he having been appointed to an unexpired term) in the regularly scheduled Democratic Primary to be held on May 3, 1938 and June 14, 1938.

"Under the provisions of the 1931 Primary act the election officials appointed by the appointing board of the County to serve in the first

primary automatically become the same officials to act in the second primary.

"The law provides that when a Member of the Appointing Board is a candidate in the election he shall be disqualified from serving as a Member of such Board and provides the manner or method by which a person shall be designated to act for him. The incumbent Probate Judge, Mrs. Lily C. Hines, will be a candidate for the Democratic nominee for Probate Judge in the Special Primary election to be held on the dates hereinabove set out, as will the Circuit Clerk who is also Register in Chancery. Neither the incumbent Probate Judge nor the incumbent Circuit Clerk, who is also Register in Chancery, are candidates in the regularly scheduled Democratic Primary to be held on May 3, 1938 and June 14, 1938.

"The premises considered please answer the following questions:

"1. How shall the Appointing Board to appoint the election officials to serve in the May 3, Primary be constituted?

"2. How shall the Appointing Board to appoint the officials to serve in the Special Democratic Primary for the nomination of a candidate for Probate Judge to be held on June 14, be constituted?

"There are more than two candidates for Sheriff. If the incumbent Sheriff is in a run-off for this office, that is, still a candidate in the Second Primary to be held on June 14, 1938, the same date as the first primary in the Special election for the nominee of a Democratic candidate for the office of Probate Judge, will this fact change the personnel of the appointing board for this Special Primary election for Probate Judge?"

In answer to your inquiries, I am of the opinion that the special primary election and the regular primary election should be treated separately. In other words, there would be two sets of election officials for each of the primary elections in question. This is the only logical solution to the problem. If the elections in question were treated together the result would be to disqualify one or more appointing officers in one of the primary elections or the other when in fact such appointing officer or officers would be disqualified only as to one of the primary elections. This is true due to the fact that the same officials appointed for the primary of either election would serve for the second primary (run-off) of the same primary election.

The appointment of election officials is governed by Article 7 of Chapter 19 (Section 437-443) of the Code of 1923. Under Section 437 the appointing board normally consists of the judge of probate, sheriff, and clerk of the circuit court. Sections 439, 440 and 441 provide for the appointing board in case of the disqualification of any of the above officers. If any one of the officers in question is disqualified, the vacancy is filled by the register of the circuit court, and if there is no register or he is disqualified, the vacancy is filled by the governor.

The premises considered, in the instant case, it follows that in the regular primary election (both first and second primaries) the sheriff is the only officer in question who is disqualified. Neither the probate judge nor the circuit clerk is disqualified as they are not running for office in said regular primary election, but only in the special primary election. The sheriff would be disqualified as he is a candidate for office in said regular primary election. As regards the special primary election (both first and second primaries),

both the judge of probate and clerk of the circuit court are disqualified, but the sheriff is not.

The vacancies in each instance should be filled in accordance with Sections 439, 440 and 441 of the Code of 1923, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 26, 1938

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Elections—

Absentee ballot legally cast cannot be counted where voter dies prior to election day.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 21, 1938, in which you request my opinion as follows:

"Please advise me of the status of a case like this:

"A person applying for an absent voter's ballot, votes it, then dies before election day, would his vote count?"

My answer to your request is in the negative.

Section 361, Code of Alabama, 1923, fixes the qualifications of an elector to vote. It starts out by saying:

"Every citizen of this state who is a citizen of the United States * * *"

It is needless to say that when a party dies his citizenship ceases and certainly if he is dead before the day set for the primary election, even though he has voted an absentee ballot, such ballot in my opinion could not be counted.

It is my opinion that if a person who obtains an absentee ballot from the Judge of Probate, marks it, certifies to the same and deposits it with the Chairman of the Executive Committee of his party and dies before the day set for the primary election, such ballot should not be turned over to the canvassing board and by it be counted. In other words, he must have the same qualifications if he votes an absentee ballot as he would be required to have should he appear at his polling or voting place on the day of election and offer to cast his vote. An absentee voter does not vote when he files his ballot with the Chairman of the Executive Committee of his party, but he in fact votes when the chairman of the Executive Committee of the party turns his ballot over to the canvassing board. The Chairman of the Executive Committee of the party for which he votes is by law made the agent of the voter to cast his vote on election day. If he dies before election day the agency automatically terminates, and if the Chairman of the Executive Committee

of his party has knowledge of his death, then he should not turn over to the canvassing board such absentee ballot. If he should however, turn it over to the board, then it would be subject to challenge as other ballots and on a contest, it is my judgment it would not be counted.

I call special attention to Section 677 and 678, Code of Alabama, 1923 and Act No. 178, Gen. Acts, 1933, p. 193, approved April 19, 1938, in regard to absentee voters in primary elections.

Section 678, as changed by the 1933 Act, supra, provides how the vote is cast and states that "the same shall be handled in all respects as if the said absentee voter was present and voting in person."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 26, 1938

Hon. Gaston Scott, President,
State Highway Commission,
CAPITOL.

Highway Department may purchase equipment on deferred payment contracts.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 26, 1938, in which you request my opinion as follows:

"The State Highway Department wishes to be advised as to whether it would be legal for this department to secure equipment on a rental-purchase basis, that is, an agreement to be entered into by and between the State Highway Department and an equipment company, by which the Highway Department would rent certain pieces of equipment at a fixed amount per month, and upon the completion of a stated period in which the payments made for the rental of the equipment would equal the purchase price of the equipment, then the said piece of equipment would become the property of the State Highway Department.

"Section 35 (1335): Highway Department may construct or purchase buildings, tools, etc., on page 359 of the General Acts of Alabama, Session 1937, provides for rental of equipment by the State Highway Department.

"By means of a rental-purchase agreement, the State Highway Department would be able to secure equipment that is now needed in the construction and maintenance work of the department, and pay for same out of its current revenues, thereby enabling the necessary equipment to be secured without the entire price having to be paid upon delivery of the equipment."

I am of the opinion that the Highway Department may purchase equipment upon a deferred payment basis, as such in your request. The so-called "rental-purchase" plan is in reality a purchase plan. Section 35 (1335) Highway Act, 1927 (1927 Acts, p. 348 at p. 359) provides as follows:

"Section 35. (1335) HIGHWAY DEPARTMENT MAY CONSTRUCT OR PURCHASE BUILDINGS, TOOLS, ETC. The State Highway Department is authorized to rent, construct, or purchase such buildings, stock, machinery, tools, materials and other equipment as it may find necessary for use in carrying out the provisions of this article and pay for the same out of the State Highway Fund. * * * "

I am therefore of the opinion that you may purchase the equipment as above suggested. Such contracts should of course, be made in the manner in which other contracts for purchases of equipment are made.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 16, 1938

Mrs. Marie Bankhead Owen, Director,
Department of Archives & History,
CAPITOL.

State Buildings—

Architect's fee for the plans of the Alabama Memorial Building may be paid for out of the appropriation for building purposes under Section 90, Code of Alabama, 1923, provided same is authorized by the Building Commission.

Opinion by Assistant Attorney General Screws.

Dear Madam:

I have your letter of May 12, which is as follows:

"Will you please advise me if the architect's fee for the plans of the Alabama Memorial Building can be paid out of the General Fund of the State Treasury, under Article 12, Sections 932, 933 and 934 of the Political Code of Alabama (1923).

"In case the sections referred to do not apply to the question asked, will you please advise if there is any other way by which this fee can be paid out of State funds with the exception of the Governor's contingent fund."

I am of the opinion that your first inquiry should be answered in the negative. Article 12 of Chapter 25 (Section 932, 933 and 934) of the Code of 1923, is applicable only to the purchasing of property by the state and does not include construction.

In answer to your second inquiry, I am of the opinion that the architect's fee for the plans of the Memorial Building may be paid for out of the appropriation for State Buildings under the provisions of Section 90, Code of 1923, provided same is authorized by the Building Commission. Chapter 9 (Sections 88, 89 and 90) of the Code of 1923, deals with the Building Commission and its authority. Section 89 authorizes the construction of appropriate administrative and judicial buildings at the instance of the Building Commission. Section 90 provides for an appropriation not to exceed One Hundred Thousand ($100,000) dollars annually to carry out the provisions of said chapter.

In an advisory opinion by the Supreme Court, it was held that the appropriation under Section 933 was a continuing appropriation and was not repealed by the provisions of the Budget and Financial Control Act. (Gen. Acts, 1932, p. 35)—**Opinion of the Justices,** 176 So. 367. The appropriation provided for in Section 90, supra, is similar to the one in Section 933 construed by the Supreme Court.

Therefore, in my opinion the appropriation provided for in Section 90, supra, is a continuing appropriation and is not repealed by the Budget and Financial Control Act. However, before any part of the appropriation is obtainable for building purposes, same must be authorized by the Building Commission as provided for in Section 89 of the Code of 1923, supra.

Under Section 89, the Building Commission is authorized to construct appropriate administrative and judicial buildings. An architect's fee, in my opinion, is a necessary incidental part of the cost of the construction above referred to. "Construction" means the putting together of materials, the act of building or making, **the act of devising and forming,** the putting together, fabrication, building, erecting, etc. **12 C. J. 1299, Central R. Co. v. Pere Marquette R. Co.,** 128 Mich. 333, 87 N. W. 271.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 16, 1938

Dr. A. F. Harman, President,
Alabama College,
Montevallo, Alabama.

Alabama College—Interest on endowment land fund paid by State can be used only for purposes of endowment. So much thereof as is within the terms of an Act of Congress approved February 18, 1899, may be used in accordance with terms of an Act approved September 15, 1935, (General Acts 1935, p. 1064). Said fund not subject to proration under Budget and Financial Control Act.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 19, 1938, which is as follows:

"I will thank you to review the decision of the Supreme Court of Alabama, October Term, 1937-1938, Seventh Division 483, in the case of A. F. Harman versus Alabama College, Appeal from Shelby Circuit Court, in Equity, and if, in consideration of this decree of the court, give me your opinion as to whether or not the appropriation to Alabama College as interest on endowment amounting to $34,964.00, General Acts of the Regular Session of the Legislature of Alabama of the year 1935 at page 798, can be applied to such loans as are authorized by the above cited decree of the Supreme Court. Specifically in your opinion does the interest on this endowment fund, which is an obligation of the State to the College in perpetuity and which has not heretofore been such to proration, come under the provisions of the Budget and Financial Control Act?

"Since the annual meeting of the Board of Trustees of Alabama College will be held on May 27, it is important that I have your opinion if possible before that date."

I am of the opinion that your first inquiry should be answered in the affirmative, to the extent that the interest on the endowment in question is interest on the proceeds derived from the lands granted for the use of the College under an Act of Congress approved February 18, 1899, or interest on the proceeds of such other land grants or endowments as authorize such a use.

Our Supreme Court in the case of Alabama College v. Harman, 175 So. 394, held that the Alabama College did not have the power generally to borrow money and pledge the properties of said institution for its payment. In said case it was pointed out that an Act approved September 15, 1935, (General Acts 1935, p. 1064), which dealt with the right of the Institution to borrow money from the Federal Government, was not properly presented for consideration. However, in the case of Harman v. Alabama College, 177 So. 747, the Court held that Alabama College could borrow money from the Federal Government in accordance with the terms of the 1935 Act, supra. Under the terms of said Act the obligations thus created could be secured by pledging the fees from students to be levied by the Institution and other moneys not appropriated by the State to the Institution; but the obligations are not to be obligations of the State and are not payable out of moneys provided for or appropriated by the State to the Institution.

We must now look to the nature of the $34,964.00 in question to determine whether said moneys or any part thereof can be applied to such loans as are authorized under the Act, supra, construed by the Supreme Court in the case of Harman v. Alabama College, 177 So. 747, supra.

Said $34,964.00 is incorporated in the general appropriation bill of 1935, as follows: "Alabama College: Interest on Endowment $34,964.00." This amount is figured to be 6% per annum interest on the principal amount held by the State in the land trust fund for the use and benefit of Alabama College as shown by the records in the office of State Comptroller. In respect to such land trust funds, Section 257 of the Constitution of 1901, provides as follows:

"Section 257. The principal of all funds arising from the sale or other disposition of lands or other property, which has been or may hereafter be granted or entrusted to this state or given by the United States for educational purposes shall be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific object of the original grants or appropriations."

The Legislature deals specifically with the land trust fund for Alabama College in Section 518 of the School Code of 1927, which is as follows:

"518. INTEREST PAID COLLEGE BY STATE.—On the last day of every quarter the State Treasurer shall pay to the Treasurer of the Alabama College, upon the order of the President of the institution, interest at the rate of six per centum per annum, on the whole amount of the fund in the State Treasury at the close of every quarter, arising from the sale of lands, and upon every sum paid into the State Treasury before the current quarter upon which interest has never been paid; and all laws or parts of laws in conflict herewith are hereby expressly repealed, it being the purpose and intent of the State of Alabama to execute in good faith the trust reposed in it by Congress when granting the lands to the State for the benefit of the institution and to preserve the proceeds aris-

ing from the leases or sales of the lands of the institution so granted by Congress as a fund forever and to pay the interest thereon for the support and maintenance of the institution."

The above shows clearly that such trust funds remain inviolate and can be used only for the purposes for which they were created. Although the $34,964.00 in question is incorporated in the general appropriation bill, it, in my opinion, is not "money provided for or appropriated by the State to the Institution" within the meaning of the Act approved September 15, 1935, (General Acts 1935, p. 1064) supra. It is the earnings of the land trust fund or endowment fund held by the State as trustee for the benefit of Alabama College. Same, in my judgment, rather comes under the category of "other moneys not appropriated by the State to the Institution," as used in the Act in question. Therefore, it can be applied to such loans as are authorized by the Act, supra, construed by the Supreme Court in the case of Harman v. Alabama College, 177 So. 747, supra, if the terms of the grants or endowments from which it is derived so authorize.

We must now look to the terms of the grants or endowments in question to ascertain the specific objects or purposes for which they were made. From the information obtainable it appears the said $34,964.00 is interest at 6% per annum on the principal amount held by the State in the land trust fund for the use and benefit of Alabama College. This principal amount is derived, either in whole or in part, under the provisions of an Act of Congress approved February 18, 1899. The pertinent part of said Act is as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the governor of the State of Alabama be, and he is hereby, authorized to select, out of the unoccupied and uninhabitated lands of the United States within the said State, twenty-five thousand acres of land, and shall certify the same to the Secretary of the Interior, who shall forthwith, upon receipt of said certificate, issue to the State of Alabama patents for said lands; PROVIDED, That the proceeds of said lands when sold or leased shall forever remain a fund for the use of the Industrial School for Girls of Alabama, located at Montevallo, Alabama."

Certain lands have been selected from time to time and patents issued accordingly.

It will be noted that the grant was for the use of the Industrial School for Girls of Alabama, located at Montevallo, Alabama. Said school is now Alabama College, as shown by Section 500 of the School Code of 1927, which is as follows:

"500. ALABAMA COLLEGE ESTABLISHED.—The school heretofore established at Montevallo as the 'Alabama Girls' Industrial School' later known as and called 'The Alabama Girl's Technical Institute' and still later known as and called 'The Alabama Technical Institute and College for Women' is and shall remain a body corporate under the corporate name of 'Alabama College,' and by that name may sue and contract, acquire and hold real and personal property, and have and exercise all the powers of a corporation established to carry on a State educational institution of higher learning and shall succeed to all the rights, privileges, emoluments, benefits, interests, and titles heretofore at any time vested in said 'Alabama Girls' Industrial School', 'The Alabama Girls' Technical Institute' and 'Alabama Technical Institute and College for Women,' respectively."

The only limitation on the grant is that it be used for the school in question. In my opinion, the proceeds from said fund may, therefore, be used as

provided for in an Act approved September 13, 1935, (General Acts 1935, p. 1064) supra, as construed by our Supreme Court. Such a use would be for the use of the school. There is no prohibition against such funds being hypothecated. Therefore, to the extent that the $34,964.00 in question, either in whole or in part, is interest on the proceeds derived from the lands granted under the Act of Congress above quoted, it may be used in accordance with an Act approved September 13, 1935, (General Acts 1935, p. 1064) supra, as construed by our Supreme Court. As to any part of the said $34,964.00, if any, which is not of this category, it will be necessary to ascertain the exact nature of the trust creating the fund to determine the purposes for which it may be used. (This information is not available to this office.) If the use is the same as the one above discussed, the funds may be likewise used in accordance with the conclusions herein reached.

In answer to your second inquiry, I am of the opinion that the endowment land fund in question is not subject to proration in accordance with the provisions of Act No. 35, S. 87, approved September 27, 1932, (General Acts 1932, p. 35) known as the "Budget and Financial Control Act." Section 21 thereof specifically provides that said Act shall not apply to endowment and trust funds or to gifts to institutions owned or controlled by the State or to the income from such endowment and/or trust funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 16, 1938

Hon. John D. McQueen, Chairman,
State Democratic Executive Committee,
Tuscaloosa, Alabama.

Primary Elections—

1. If one of the two candidates for a state office receiving the highest number of votes in the first primary, in a race where there are more than two candidates and none of said candidates receives a majority of the votes cast, certifies to the Chairman of the State Democratic Executive Committee his declination to enter the second primary election, the Chairman should, upon receipt of such notification, declare the other of the two highest candidates the nominee of the party for said office and so certify his name as such nominee to the Secretary of State.

2. This procedure should be followed provided the candidate so notifies the Chairman of the State Democratic Executive Committee of his declination to be a candidate in the second primary election on any date prior to the date by which the Secretary of State must certify to the various probate judges the names of the candidates for state office to be voted on in the second primary election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 16, 1938, which follows:

"Please give me your official opinion as to my duties under the following statement of facts:

"In the Democratic Primary Election, held in this state on May 3, 1938, there were several races in which there were more than two candidates for the nomination for that particular office, and no one of said candidates received a majority of all the votes cast in said race. In two of these races, the runner-up, that is, the candidate receiving the second highest number of votes, notified me by wire yesterday, the wire being received by me today, that he did not desire to make further contest, that he declined to be a candidate in the second primary to be held on June 14, 1938, and conceded the nomination of the candidate receiving the highest number of votes for said office in the May 3rd Primary Election.

"The premises considered, should I, as Chairman of the State Democratic Executive Committee, declare the candidate receiving the highest number of votes in each of these races the nominee of the party for that office, and so certify his name as such nominee to the Secretary of State?"

Your duties in the premises are governed by the pertinent provisions of the 1931 Primary Act, which is Act No. 56, General Acts 1931, page 73, approved February 25, 1931. These provisions are found in Section 29 of said Act, which reads in part as follows:

"* * * If no candidate receive a majority of all of the votes cast in such primary election for any office or offices for the nomination to which there were more than two candidates, then there shall be held a second primary election on the second Tuesday in June next following said primary election, and the Chairman of the State Executive Committee shall certify to the Secretary of State, within three days from the date the State Executive Committee, or sub-committee thereof, canvassed the returns of the first primary election, the names of the two candidates of his party to receive the highest number of votes in the first primary election for such office, or offices, except County offices, and who are to be voted for in the second primary election, and the Chairman of each County Executive Committee shall, within three days from the date the County Executive Committee canvassed the returns of the first primary election, certify to the Probate Judge of the County the names of the two candidates who received the highest number of votes in the first primary for nomination to any County office; and the Secretary of State shall, within not more than Five days from the date he receives said certificate from the Chairman of the State Executive Committee, certify to the Probate Judge of any County where a second primary election is to be held the name or names of the candidates certified to him as herein provided by the Chairman of the State Executive Committee; and the Probate Judge of each county in Alabama shall in manner and form as required by this Act and the general laws of Alabama have prepared and printed all election supplies and all ballots to be voted in the second primary election, which ballots shall contain, under appropriate headings or titles of the offices to be filled, the names of the two candidates for each office so certified to him by the Secretary of State and the Chairman of the County Executive Committee, as herein required, as well as such other matters as are required by this Act and the general laws of Alabama, on ballots for the first primary election. At the second primary election no one can be a candidate except the two persons who received the highest number of votes for the office for which they were candidates, in the first primary election. * * * **In the event either of the two candidates receiving the highest number of votes in the first primary election shall determine not to enter the second primary election, herein provided for, he shall, as soon as possible and not less than ten days after the holding of the first primary election, certify his declination to enter such second primary election to the Chairman of the State Exec-**

utive Committee of his party, if the office is an office other than a County office or to the Chairman of the County Executive Committee of his party if the office is a County office, and upon the receipt of such notification the Chairman of such Committee shall declare the other candidate the nominee of the party for said office and certify his name as such nominee to the Secretary of State or Probate Judge, as the case may require, and a second primary election for the nomination of a candidate for that particular office shall not be held, nor shall his name be printed on the ballot of the second primary election. * * *" (Emphasis ours)

From the above-quoted provisions of the applicable law, it can be seen that if no candidate receives a majority of all votes cast in a primary election for any office where there are more than two candidates, the two candidates who receive the highest number of votes in the first primary automatically become the only candidates for said office in the second primary election, unless one of them declines to be a candidate. These provisions provide the manner by which the names of the two candidates receiving the highest number of votes in the first primary election shall be certified as the candidates in the second primary election, and also the method or manner by which one or the other of them may decline to become a candidate in said second primary election. It is with the provisions concerning the latter situation that we are primarily concerned. These provisions are emphasized in the above-quoted excerpt from Section 29 of said 1931 Primary Act. It will be noted that, in the event either of the two candidates receiving the highest number of votes in the first primary election, in a race where there are more than two candidates and no one of them receives a majority of all votes cast, shall determine not to enter the second primary election, "he shall, as soon as possible and not less than ten days after the holding of the first primary election, certify his declination to enter said second primary election to the Chairman of the State Executive Committee of his party," in which case the Chairman, upon receipt of such notification "shall declare the other candidate the nominee of the party for said office and certify his name as such nominee to the Secretary of State * * *, and a second primary election for the nomination of a candidate for that particular office shall not be held, nor shall his name be printed on the ballot of the second primary election." On the one hand, the law provides that such a candidate shall certify his declination to enter the second primary election "as soon as possible," and on the other hand, it provides that he shall so certify his said declination, "not less than ten days after the holding of the first primary election." These two provisions are ambiguous, conflicting, and confusing. Therefore, we must search for, and arrive at, the legislative intention, and give it effect, if at all possible to do so.

The term "not less than" has been construed literally. **Worth v Peck,** 7 Pa. 268; **Rusch v. City of Davenport,** 6 Iowa 443; **Chambers v. Smith,** 12 Mees. & W. 2, all from Words & Phrases, 1st Series, Volume 5, pages 4833-4834. **Crawford v. School Tp. of Beaver, Dallas County,** 166 N. W. 702, Words & Phrases, 3rd Series, Volume 5, page 471. On the other hand, it has been held to mean "not more than." **Stimpson v. Pond,** 23 Fed. Cases 101.

If the clause "not less than ten days after the holding of the first primary election," is given a controlling effect, and is construed literally, such a candidate could not certify his declination to enter the second primary election until after ten days had expired from the date on which the first primary election was held, and a certification of his declination to enter the second primary election before that time would come too soon. Certainly, this would be opposed to the clause providing that he certify such declination "as soon as possible."

On the other hand, if it is given a controlling effect and construed to mean "not more than", then such a candidate would have to certify his declination to enter the second primary election on the day following the date on which the state committee receives the returns of the first primary election, canvasses, tabulates and publicly declares the results, which is the second Thursday next following the date of the holding of the first primary election. Section 29, supra. This would give such a candidate very little time, after he knew the official result of the first primary election, to determine the course which he desired to follow.

The primary and fundamental rule of statutory construction, to which all other rules are, and must be, subordinated, is to ascertain and give effect to the intention of the Legislature as expressed in the statute. **Street v Cloe,** 207 Ala. 631, and numerous cases cited and collated in 18 Ala. Dig., Statutes, 181.

In seeking this intention, a statute must be construed as a whole, and the intention of the whole Act will control the interpretation of the parts. **Patterson v. State,** 16 Ala. App. 483.

To harmonize seeming conflicts in the statutes, the less certain must yield to the more certain terms of the statute. **Marengo County v. Wilcox County,** 215 Ala. 640.

Whether the provisions of an act are directory or mandatory must be determined by consideration of the subject matter and the relations of each provision to the general subject, so as to arrive at the true legislative intent. **Citizens' Bank and Security Company v. Commissioners' Court of DeKalb County,** 209 Ala. 646.

In determining whether the provisions of a statute is directory or mandatory, the primary object is to ascertain the legislative intention disclosed by the statute, in relation to its subject and purpose. **Board of Education of Jefferson County v. State** 222 Ala. 70.

When these rules of construction are applied to the above quoted provisions of the 1931 Primary Law, which govern your duties in the premises, it is my opinion that the clause "as soon as possible" should be given a controlling effect over the ambiguous and conflicting and uncertain clause "not less than ten days after the holding of the first primary election." The purpose of all of the pertinent provisions of the Act is to insure the nomination of candidates of the party by a majority of the voters thereof, in all cases where primary elections are held, but at the same time to make it possible for one of the two candidates receiving the highest number of votes, in a race where there are more than two candidates and no candidate receives a majority of the votes cast for that office to withdraw from the contest, if in his unbridled discretion he deems such a course to be for his best interests, or the best interests of the party, the State, or for any reason whatsoever. To this end, the machinery for such a candidate to make known his intentions is provided. In my judgment, it was the intention of the Legislature in providing this machinery that such a candidate who did not desire to enter a second primary election should so make known to the people of the State at the earliest possible moment after he arrived at such decision, to the end that the other candidate might be declared the nominee, and the necessity of the expense of the second primary election might be obviated, together with all the other liabilities attendant thereupon, in which event no second primary election for that office is held. This intention is accomplished if such a candidate certifies his declination to the Chairman of the party committee and the Chairman in turn certifies the name of the other candidate as the nominee of the party for that office to the Secretary of State, at any

time before the last date on which the Secretary of State must certify to the various probate judges the names of those candidates to be voted on in the second primary election.

In my opinion, this construction gives effect to the intention of the Legislature in enacting the above-quoted provisions of law, and consequently, I hold that if one of the two candidates receiving the highest number of votes for an office, in a race where there are more than two candidates and no candidate receives a majority, decides not to enter the second primary election, that he should notify the Chairman of his party committee of said declination at the earliest possible moment after he makes his decision, and that in such a case, if the Chairman receives the notice at any time before the last date on which the Secretary of State must certify to the various probate judges the names of the candidates to be voted on in the second primary election, then the Chairman should certify the name of the other candidate to the Secretary of State as the nominee of the party for said office, and no second primary election should be held for said office, and the name of no candidates for said office should appear on the ballot in the second primary election.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 18, 1938

Hon. W. U. Wells,
Chairman, The Democratic Executive
Committee of Houston County,
Dothan, Alabama.

Elections—

1. Where more than two candidates seek the Democratic nomination to any office, only the two receiving the highest number of votes in the first primary election are entitled to have their names printed on the ballot to be used in the second primary election.

2. If either of the two candidates for said office receiving the highest number of votes in the first primary election withdraws, or declines to enter the second primary election, the other candidate should be declared the nominee of the party for said office, and the names of no candidates for said office should be placed on the ballots to be used in the second primary election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 18, 1938, which follows:

"In the recent Democratic Primary, held in Houston County on the 3rd day of May, 1938, U. G. Watford, I. C. (Clem) Ezell, John A May and Jeff Baxley were candidates for nomination to the office of Sheriff of Houston County, Alabama. In said primary election U. G. Watford received 2426 votes; I. C. Ezell received 1575 votes; John A. May received 927 votes and Jeff or J. J. Baxley received 783 votes. Neither of the candidates for nomination to said office in said election received a majority

of the votes cast therein, for nomination to that particular office, but the said U. G. Watford and the said I. C. Ezell received the highest number of votes cast in said primary for the nomination of Sheriff of said County.

"The said I. C. Ezell has given written notice to the Chairman of the Democratic Executive Committee of Houston County that he has surrendered the nomination for Sheriff of said County to the said U. G. Watford and that he, therefore, declines to become a candidate in the second primary, and requested that his name be withdrawn as a contesting candidate in the second primary.

"After the surrender of the nomination by the said I. C. Ezell, as aforesaid, the said John A. May has made demand upon me, W. U. Wells, Chairman of the Democratic Executive Committee of Houston County, to certify to the Probate Judge of Houston County, Alabama, the name of John A. May, as one of the candidates for nomination to the office of Sheriff of Houston County, Alabama, at the Democratic Primary Election to be held on the 14th day of June, 1938.

"QUESTIONS: Does the said John A. May, who was not one of the two who received the highest number of votes cast in said primary election, for the office of Sheriff of Houston County, have the right to have his name placed on the ticket, to be voted upon at the second primary election to held on the 14th day of June, 1938, under the provisions of Section 29 of the 1931 Primary Act, found on page 73 et seq of the General Acts of Alabama of 1931, or under any other law of Alabama? Should I, as Chairman of the Democratic Executive Committee of Houston County, Alabama, comply with the request of the said John A. May and certify to the Judge of Probate of Houston County, Alabama, that he is one of the two candidates who received the highest number of votes in the first primary election held in Houston County, on the 3rd day of May, 1938, for nomination to the office of Sheriff of Houston County, Alabama?

"I will appreciate it if you will kindly furnish me with an opinion stating what the law is, with reference to the questions hereinabove submitted."

In my opinion, both of your inquiries should be answered in the negative. That is, first the said John A. May, who was not one of the two candidates who received the highest number of votes cast in the first primary election, for the office of Sheriff of Houston County, does not have the right to have his name placed on the ballots, as a candidate for said office, in the second primary election to be held on the 14th day of June, 1938. Second, you should not as Chairman of the Democratic Executive Committee of Houston County, comply with the request of said John A. May that you certify his name to the Judge of Probate of Houston County, Alabama, as being one of the two candidates who received the highest number of votes in the first primary election held in Houston County on the 3rd day of May, 1938, for the nomination to the office of Sheriff of Houston County, Alabama.

The identical questions presented by your inquiry have been previously passed on by this office. On May 5, 1934, Hon. Paul J. Hooton, Member of State Senate, Roanoke, Alabama, requested our opinion on the following statement of facts:

"You state that A, B, C, D, and E were candidates for Democratic nomination for the office of sheriff of Randolph County. That A received 1500 votes, B receives 1300 votes, C receives 1100 votes, D receives 700 votes and E received 500 votes. You further state that within three days after the First Primary B withdrew from the race.

"You ask whether or not C can demand the candidate receiving the third highest number of votes to enter the Second Primary with A or whether or not A is automatically the nominee of the party."

We answered his request of May 15, 1934, in an opinion addressed to him, Biennial Report of the Attorney General, 1932-34, page 563, as follows:

"I am of the opinion that under the above stated facts, B having withdrawn from the race and having received the second highest number of votes that A who received the highest number of votes is automatically the nominee of the Democratic party. I refer you to certain provisions of Section 29 of the 1931 Primary Act, Act No. 56, H. B. 73 (General Acts 1931, pages 73-96). On the bottom of page 85 and the top of page 86 appears the following provision:

"'At the second primary election no one can be a candidate except the two persons who received the highest number of votes for the office for which they were candidates in the first primary election.'

"Beginning on line 5 and ending on line 20 of page 87 appears the following provisions:

"'In the event either of the two candidates receiving the highest number of votes in the first primary election shall determine not to enter the second primary election herein provided for, he shall, as soon as possible and not less than ten days after the holding of the first primary election, certify his declination to enter such second primary election to the chairman of the State Executive Committee for his party, if the office is an office other than a county office, or to the chairman of the county executive committee of his party if the office is a county office, and upon the receipt of such notification the chairman of such committee shall declare the other candidate the nominee of the party for said office and certify his name as such nominee to the Secretary of State or Judge of Probate, as the case may require, and a second primary election for the nomination of a candidate for that particular office shall not be held, nor shall his name be printed on the ballot of the second primary election.'"

In accordance with the holding of said opinion and the provisions of the applicable statutory law therein cited and quoted, each of the questions propounded in your letter of inquiry must be answered in the negative.

On the basis of the same authorities, you should certify to the Judge of Probate of Houston County the name of Mr. U. G. Watford as the nominee of the Democratic party for the office of Sheriff of Houston County, Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 19, 1938

Mrs. Marie B. Owen, Secretary,
Alabama Memorial Commission,
CAPITOL.

Alabama Memorial Commission—

Appropriation—

Under Acts, 1919, page 18 (Code of 1923, Section 1553), the appropriation of $50,000 as the state's official contribution towards the construction of a World War memorial will be available for such purpose if, as and when an aggregate sum of $200,000 made available from sources other than said state appropriation is expended towards the acquisition of lot and construction of said memorial.

Opinion by Assistant Attorney General Rowe.

Dear Mrs. Owen:

I have your request for opinion as follows:

"Will you please refer to Section 4, of the Act creating the Alabama Memorial Commission, prescribing its powers, etc., approved February 3, 1919, and see if the appropriation of $50,000.00 to be paid by the State as its official contribution, after $200,000 has been raised by public subscription, can be collected by the Alabama Memorial Commission?

"I beg to call your attention to the fact that the Federal grant of $174,000 for the building and the $60,000 raised by public subscription, from which fund the lot was bought, totals $234,000."

In my opinion, the appropriation of $50,000 as the state's contribution towards the erection of a World War memorial is still effective; and the combined contributions of $60,000 raised by public subscription and $174,000 contributed by an agency of the Federal government are sufficient to meet the requirement of the statute that the official contribution of the state ($50,000) should not be available until the sum of $200,000 has been raised by voluntary contribution throughout the state.

As to the first premise, the case of **Southern Industrial Institute v. Lee,** 175 So. 365, (Alabama Supreme) is controlling. Cf. **In re: Opinions of the Justices,** 176 So. 367.

As to the second premise, it is my judgment that the appropriation was intended by the legislature to be conditioned upon the availability of a sum not less than $200,000 from sources other than the said appropriation, in order for the same to be effective. Section 4 of Acts, 1919, page 18, (Code of 1923, Section 1553), which makes the appropriation, provides in part:

"The sum of $50,000 is hereby appropriated as the official contribution on the part of the state towards the erection of such memorial, but such sum shall not be available until the sum of $200,000 **has been raised by voluntary contribution throughout the state,** and such sum shall not be actually expended from the state treasury until the expenditure first of the amounts vountarily contributed."

Of course, the cardinal rule of statutory construction is that the intention of the legislature should be sought and when ascertained, declared. **Alabama Digest, Vol. 18, Title "Statutes", Key No. 181 et seq.** However, statutes should be construed to effect the legislative intent and to avoid unjust or absurd conclusions. **Ex Parte Rowe,** 59 So. 69.

At the time (1919) of the original enactment of the appropriation for the state's contribution towards the erection of the memorial, no one could have foreseen the future events which would make Federal aid grants available for such construction purposes. At that time, based on past experience, the legislative mind, no doubt, conceived the idea and thought that the only source from which that portion of the cost of the erection of such a memorial not provided for by the appropriation, could be realized was from voluntary contributions on the part of patriotic and public spirited citizens within the State of Alabama. I do not think that the underlined words of the appropriation statute, supra, were intended by the legislature as words of limitation. The principle theme of the quoted excerpt was than an appropriation of $50,000 from state funds should be made for such purposes provided the sum of $200,000 was made available from other sources. The fact that subsequent events made it possible for a large part of this $200,000 fund to be made available by grants from agencies of the Federal government rather than by contributions from citizens within the State of Alabama, doubtless would not have affected the principal theme of the legislative declaration had such events been foreseen at the time of the enactment of the appropriation statute.

It is my opinion, therefore, that if, as and when the aggregate sum of $200,000 made available from sources other than said state appropriation is expended or irrevocably allocated for expenditure towards the acquisition of a lot and the construction of the memorial, the state appropriation of $50,000 will be available therefor.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 21, 1938

Hon. Edgar H. Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Primary Elections—

Number of votes necessary to constitute majority required for nomination in race where there are two positions to be filled and three candidates for said positions.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 21, 1938, which follows:

"Please render me an official opinion as to my duties under the following statement of facts:

"In the May 3rd Primary Election there were three candidates for the Democratic nomination for membership on the school board of Franklin County. There were two positions to be filled on said board. Mr. A received 2412 votes. Mr. B. received 1602 votes. Mr. C received 1383 votes. Should Mr. A and Mr. B be declared the Democratic nominees for the two positions to be filled on the county school board, or should I certify the names of any of said candidates as candidates for this position in the June 14th Second Primary Election?"

The law governing the situation outlined in your letter of inquiry is found in the last part of Section 29 of Act No. 56, General Acts, 1931, page 73, approved February 25, 1931, which said Act is generally known as the 1931 Primary Act. This section reads in pertinent part as follows:

> "If nominee for two or more offices (constituting a group) are to be selected, and there are more candidates for nomination than there are such offices, then the majority of votes cast for said office in such election shall be ascertained by dividing the total vote cast for all such candidates by the number of positions to be filled, and then dividing the result by two. Any number of votes in excess of the number ascertained by such last division shall be the majority herein provided for necessary for nomination. If in ascertaining the result in this way, it appears that more candidates have obtained this majority than there are positions to be filled, then those having the highest vote, if beyond the majority just defined, shall be declared the nominees for the positions to be filled."

Applying the formula there laid down to the instant case, we obtain the following results: There was a total of 5397 votes cast in said election. When this is divided by the number of positions to be filled, that is, two, the result thus obtained is 2698½. When this result, that is, 2698½, is divided by two the result thus obtained is 1349¼. Any number in excess of this number, that is, any number in excess of 1349¼, is the number necessary for a majority required for nomination. Since each of the three candidates received a majority, then the two having the highest number of votes, that is, Mr. A with 2412 votes and Mr. B. with 1602 votes, are the nominees of the party for the two positions to be filled on the county school board, and there is no necessity for a Second Primary Election in this case, nor can such a Second Primary Election be held. On the contrary, the two candidates receiving the highest number of votes in the First Primary Election, Mr. A and Mr. B, are the nominees of the party for the two positions to be filled, and their names should be so certified by the proper authorities.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 23, 1938

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Filing tax—

1. Oil and gas leases subject to filing tax.

2. The deed tax in such cases is measured by the reasonable cash value of the property or interest in the property conveyed by the deed filed for record.

3. Determination of the amount to be paid on such instrument offered for recording is left to the probate judge.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of April 29, 1938, in which you request my opinion as follows:

"A short time ago there was filed with me for record a number of oil and gas leases by which instruments the owners of the land granted to the lessees named Spearman and Robinson, respectively, the privilege of mining and operating on the lands described for oil and gas and laying pipe lines and erecting the necessary buildings and structures for saving and treating the product extracted. The expressed consideration in each of these instruments was one dollar, but there are additional clauses, that of the lessees do not commence a well on the lands within one year from the date of the lease then the lease shall terminate, unless the lessees shall on or before the expiration of said one year pay the lessor an amount specified which is at the rate of $0.10 per acre of the land leased. Such payment extending the time for commencing a well another year and with privilege of renewal on like payment.

"If a productive well results, the lessor is to have one-eighth of oil and royalty. If only gas is found, $200.00 per well per year. I have just received for record another instrument by which the original lessees assign and convey all their rights, title, interest and privileges to sub-lesses. (The latter being the one who offer the instrument for record). In a number of the leases, not all of them, the sub-lessees being under the same obligations as their grantor.

"I wish your instructions or opinion on what basis or by what method I shall determine the amount of deed record privilege tax, if any, to be collected on the recording of this instrument. It seems obvious that no absolute valuation is fixed, either by this instrument or by the original lease instruments, because so much depends on whether the lessees commence operations at all and whether such operations produce either oil or gas or possibly produce nothing. Will you please give me your opinion so that it may be received by me not later than Monday of next week."

This office has previously held that leases similar to the one mentioned by you are subject to the payment of the recording tax. See 1926-28 Biennial Report of the Attorney General, page 621; 1928-30 Biennial Report of the Attorney General, page 683.

It has also been held by this department that "the deed filing tax is measured by the reasonable cash value of the property, or interest in property, conveyed by the deed filed for record." (Opinions cited supra).

The rule for determining the amount of tax to be paid on an instrument left with the probate judge to be recorded is set forth by the Supreme Court of Alabama in the case of **Long v. Jasper Land Company,** 217 Ala. 593, 117 So. 210. The rule, as stated in that opinion in paragraph 2, is as follows:

"The determination of the amount of tax to be paid on an instrument is left to the probate judge. In accord with the general rule that fraud and misrepresentation are not to be presumed, we are of the opinion that the probate judge may accept as prima facie correct the recitals of the deed that it was 'executed for a nominal consideration for the purpose of perfecting the title to real estate'; and may act accordingly, in the absence of any fact or circumstance to the contrary, coming to his attention calculated to put on notice a reasonably prudent

person. Should it develop subsequent to the recordation of the deed that the recitals of the deed were misleading and untrue, the judge of probate, acting in good faith as above indicated, would find protection, though, under the language of the act, there may be a collection of the correct amount of tax due subsequent to the recordation of the deed."

The above holding was followed in the case of **Thompson v. Smith, 174 So. 796, in paragraph 1.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 24, 1938

Hon. L. C. Garrison,
Judge of Probate,
Walker County,
Jasper, Alabama.

Corporations—Benevolent corporation, not organized for business or profit, under Section 7046, pays to Probate Judge filing and recording fee of $2.00 and $1.00 for issuing a charter.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letters of recent date, together with a copy of the Constitution and Bylaws of the Alabama Old Age Benevolent Association, as to which you request my opinion as follows:

"There has been filed in this office for recording, the Declaration of Incorporation of the Alabama Old Age Benevolent Association, the intents and purposes of which are too lengthy to include in this letter, but for your complete information a complete copy of the paper is enclosed.

"An opinion from you at your early convenience, showing the amount of filing fees, other than the recording fee, if in your opinion any are due or not due, is very much desired."

Upon examination of the certificate of incorporation and constitution and bylaws which you supplied me, stating that this corporation is organized for the advancement of the social, economic and financial well-being of its members, and for the cooperation of, and with, other organizations whose purposes are for the uplift and general welfare of humanity; and from the further fact that active members of this association must be over the age of sixty years, it is my conclusion, pursuant to the reasoning in the case of **Fairhope Single Tax Corporation v. Melville,** 193 Ala. 289, that the Alabama Old Age Benevolent Association is attempting to organize under the authority granted in Article IX, Section 7046, Code of Alabama 1928, Michie.

The proper fee to be charged by your office for filing and recording the certificate of incorporation is $2.00 and $1.00 for issuing the charter to the said corporation under Section 7285, Code of Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 25, 1938

State Tax Commission,
CAPITOL,
Montgomery, Alabama.

State Tax Commission—Motor Vehicle license—State Tax Commission authorized to enter into reciprocal agreements with agents of other states regulating operation of motor vehicles licensed by one contracting state on the highways of the other contracting state under act of the Extra Session of 1936, page 208, amending Schedule 158.15, Section 348, Revenue Act of 1935.

Opinion by Assistant Attorney General Crenshaw.

Gentlemen:

I have your letter of May 16, requesting my opinion as follows:

"Will you please advise us whether or not the State Tax Commission has the authority to make and enter into reciprocal agreements in reference to motor vehicles with sister states.

"We think that this right is conferred by the Revenue Acts of 1935, Article 13, Chapter 6, Schedule 158.15—as amended—Acts Extra Session 1936, page 208 which specifically provides:

" 'The State Tax Commission of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that will be considered as a fair exchange of rights and privileges. The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other.

" 'The above reciprocal agreement can be annulled on a notice issued to either party by the other party thereto within thirty (30) days thereafter.' "

In my opinion the act in question (Acts of Extra Session, 1936, page 208), quoted in your letter of inquiry, affords ample authority for the State Tax Commission to enter into reciprocal agreements with agencies of other states regulating the operation of motor vehicles duly licensed by the one contracting state while the same are being operated in the other contracting state.

The legislative authority is not, in my opinion, in conflict with the constitutional provisions as to equal protection of the laws. In the case of **State v. Firemen's Fund Insurance Co.**, 223 Ala. 134, 134 So. 858, the Supreme Court of Alabama held unconstitutional a statute requiring foreign insurance companies to make as large deposits of securities and to pay as much taxes as required of Alabama companies by laws of such foreign company states. The basis of such decision was that the Alabama Court could not confide to a foreign jurisdiction the legislative discretion to change the amount of taxes levied in the State of Alabama.

The reciprocal agreements referred to in your letter do not, in my opinion, come within the rule announced by the Supreme Court of Alabama in that case. The power of the Legislature to make reasonable classifications for license purposes and the right of the Legislature to make reasonable regulations as to the use of the highways have both been many times recognized. Under the reciprocal agreements referred to, the legislative

authority is delegated to the State Tax Commission to make just agreements regulating the use of the highways of Alabama. In my opinion, such agreements are not prohibited and the State Tax Commission is within its authority in executing such agreements.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 25, 1938

Hon. Henry S. Long, Chairman
State Tax Commission,
Capitol.

Attention of Mr. Harry Simon, Chief Clerk,
Privilege License Department.

Corporations—Mutual Cooperative and Marketing Corporations—

1. Associations organized under the authority of General Acts, 1935, p. 604, are not authorized to engage in the business of selling merchandise not essential to the production, processing, packing or sale of agricultural products.

2. Such an association is not authorized to engage in the sale of commodities such as tobacco (not raised or produced by its members) and soft drinks and would be subject to the payment of a privilege license to the state and county for the sale of these commodities.

3. Such an association would have authority to sell automobile accessories to be used on farm implements or trucks as being essential to the production, processing, packing or sale of agricultural products and therefore would be exempt from the payment of state and county privilege license.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Under the provisions of Act No. 220, p. 604, General Acts of 1935, authority is granted for the incorporation of mutual co-operative marketing and purchasing corporations of agricultural products, and to grant to such associations certain exemptions from ad valorem taxes and privilege licenses.

"1. Under the provisions of this Act, would you hold that such an association or corporation organized under the authority of Act No. 220, supra, be authorized to engage in the business of selling merchandise that was not essential to the production, processing, packing or sale of agricultural products?

"2. Would such an association organized under the provisions of the aforesaid Act have authority to engage in the sale of such commodities as tobacco (not raised or produced by its members), soft drinks, automobile accessories or other merchandise not the products of the farm?

"3. If you hold that such association may engage in the buying and selling of commodities mentioned in the above paragraph, would such association be exempt from the payment of the privilege license to the State and county for the sale of tobacco, soft drinks and automobile accessories?"

1. Your first question should be answered in the negative. Pursuant to Section 9 of the General Acts 1935, page 607, an association organized under the provisions of this act is given power to generally engage in any business **necessary or useful in the production of agricultural products.** Section 9 mentions some of the articles that are necessary or useful in the production of agricultural products, but the emphasized words are words of limitation. So that in my opinion, an association organized under the authority granted in this law would not be authorized to engage in the business of selling merchandise that was not essential to the production, processing, packing or sale of agricultural products, in other words such acts would be "ultra vires" of the association.

2. Your second question should be answered in the negative with one exception. Where an association is organized under the authority of this act and engages in the sale of commodities such as tobacco, soft drinks or other merchandise not the products of the farm, it is exceeding the powers granted to it by Section 9 of this act. Since the purpose of this law was to provide for cooperative marketing and purchasing of agricultural products or articles necessary in the production of agricultural products, by no stretch of the imagination could tobacco and soft drinks come under this classification. In reference to automobile accessories where these accessories are to be used on farm implements such as tractors, etc., and on commercial vehicles used in hauling farm products to markets and in bringing to the farm seed, fertilizer etc., it is my opinion that these accessories would come under the classification,

"Any other goods, wares or merchandise necessary or useful in the production, processing, packing, storage, distribution and marketing of agricultural products * * *"

contained in Section 9, supra. Naturally, automobile accessories to be used in private passenger automobiles could not be included herein.

3. Such an association would not be exempt from the payment of the privilege license to the state and county for the sale of tobacco and soft drinks. By using the same reasoning as set forth above, it is my opinion automobile accessories as so limited would be exempt, as Section 15 of General Acts, 1935, page 604, provides in part as follows:

"* * * and all goods and articles purchased or acquired by such corporation, whether in or out of the state, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this state, shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this state."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 26, 1938

Dr. A. F. Harman,
President, Alabama College,
Montevallo, Alabama.

Alabama College—Authority of Board of Trustees to take over Works Progress Administration Project—

Works Progress Administration Project constructed on college campus, originally intended for non-scholastic purpose, when turned over by said agency to college for scholastic purpose, may be altered and added to for the purpose of adapting the same to scholastic uses; and college funds may be expended therefor.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion in which you inquire whether the Board of Trustees of Alabama College may expend funds belonging to the college in making additions to or alterations in a certain gymnasium and aviation hangar, constructed on the college campus for aviation purposes by the Works Progress Administration, which agency has agreed that the college may, take over the same for such uses as may to the college authorities seem appropriate. I understand that these alterations and additions are necessary in order to adapt the project to the uses of the college.

Attached to your inquiry is a letter from the acting Works Progress Administrator of Alabama, which I quote:

"I have contacted the Aviation Commission, relative to your proposed changes on the hangar located on the school property. Since they except to complete the landing field and hangar at Columbiana, they do not expect to make further improvements for landing facilities at the Montevallo location.

"It is satisfactory with them for you to take over the properties and use all facilities to the best interest of your institution."

In my opinion, the Board of Trustees may authorize the additions and alterations you refer to in order to adapt the project for college uses.

The Board of Trustees has general authority to authorize the expenditure of funds appropriated to the college in making additions to and alterations in its plant. In this instance, the project begun by the Works Progress Administration and intended for a non-scholastic purpose will, when abandoned to or turned over to the college by the Works Progress Administration, fall in the same category as any other part of the college plant. **See Alabama College v. Harman,** 175 So. 394. Cf. Quarterly Report of the Attorney General, Vol. 1, page 28.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 27, 1938

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Alcoholic Beverage Control Board can pay fee of sheriff for seizure out of the proceeds of confiscation and sale of unstamped and unidentified whiskies or motor vehicles caught transporting such whiskies.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"We would like to have your opinion on the following:

"If the Alabama Alcoholic Beverage Control Board proceeds under the provisions of Sections 33 and 35 of the Alabama Beverage Control Act for the confiscation and sale of unstamped and unidentified whiskies and/or motor vehicles, caught transporting the same, can it pay out of the proceeds received from the sale of the said whiskies and motor vehicles, the fees provided by law for a sheriff or other officer who made the seizure, and/or arrest, the same having been made by an officer other than an agent of the Alabama Alcoholic Beverage Control Board?"

Sections 33 and 35 of the Alabama Beverage Control Act both provide that the proceeds of confiscation and sale of confiscated whiskies shall be turned over by the Board to the State Treasurer. No specific mention is made in such sections of the fees to officers for making the seizure. However, under the provisions of Section 61, of the Alabama Beverage Control Act, such act does not repeal "any law now fixing fees to officials for the enforcement of any and all laws, including this act, but the same shall remain in full force and effect."

Under the express provisions of the Alabama Beverage Control Act, therefore, the official making such seizure remains entitled to the same fee formerly given to him by law. It is clear that the official making seizure of stamped or identified alcoholic beverages illegally sold could and should proceed in accordance with the appropriate sections of Article 11, Chapter 167, of the Code of 1923. It would follow that such official would be entitled to his fee as provided in such Article 11, of Chapter 167. It would be anomalous to hold that such official, entitled to a seizure fee for seizing stamped whiskies, would not be entitled to a fee because the beverages sold were unstamped or unidentified whiskies. In my opinion, the only reasonable construction of these provisions of the Alabama Beverage Control Act is reached by applying the provisions of Article 11, of Chapter 167, as to officers' seizure fees for confiscation under such Chapter 167, to a similar confiscation under the later provisions of Sections 33 and 35 of the Alabama Beverage Control Act.

It is therefore my conclusion that although the Alabama Beverage Control Act make no specific provision for the payment of fees out of the proceeds of confiscation and sale of unstamped and unidentified whiskies, that such fees are properly payable as provided by Section 4777 of the Code of Alabama of 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 30, 1938

Hon. Travis H. Johnson,
Treasurer, Walker County,
Jasper, Alabama.

Grand Jury certificate, witness certificate, and fine and forfeiture certificate, issued prior to 1900 and not registered, are not valid claims against the county.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I have your letter as follows:

"I am sending you one Grand Jury Certificate issued to one R. A. O'Rear in the fall term of 1899, signed by a J. M. Phifer as foreman. The amount of Certificate $1.00. One Clerks Fine and Forfeiture Certificate issued by the clerk of the County Court of October, 1897, signed by C. C. Kelley, Clerk and Jas. W. Shepherd, Judge of Probate. The amount of certificate $2.85.—One Clerks Fine and Forfeiture Certificate issued by the Clerk of the Circuit Court for the spring term of 1898, signed by C. C. Kelley, Clerk; and Jas. W. Shepherd, Judge of Probate. The amount of certificate $10.20.—One Witness certificate issued to a one J. P. Craft in the Circuit Court, Spring term of 1898. Total amount of certificate $1.10.

"You will note that none of these certificates have been endorsed or bear any marks or sign of having been previously registered with the County Treasurer for payment. I do not find any record indicating that they have been paid, or any record of registration of these claims. I have thirty three (33) like or similar claims issued about the same dates as the one enclosed herewith. The parties to whom the claims are made payable are dead, but few exceptions. Claims were presented by an heir. Please give me your opinion as to whether they are still valid claims against the County, and if they should be registered with this office for payment as soon as funds are available to pay claims of this nature (Witness, etc.)"

I am of the opinion that these claims are not valid claims against Walker County and cannot now be registered with you as treasurer for payment.

The provisions for the payment of witness certificates applicable to the certificates in this particular case are found in Sections 1337 and 1429 of the Code of Alabama, 1896. With very slight changes these sections have been carried forward and are now Sections 3762-3767, Code of Alabama, 1923. There is no provision in these sections as to when a certificate issued to a witness or a grand jury witness must be registered with the treasurer of the County but it has been held in the case of **Henry v. State,** 16 Ala. App. 670, that "Presumption of payment arises from lapse of time, and apart from any statutory regulations the presumption of payment of a judgment, or other obligation twenty years after its maturity or its rendition is conclusive. **Semple v. Glenn,** 91 Ala. 245, 6 So. 46; **Roach v. Cox,** 160 Ala. 425, 49 So. 578."

A certificate to a witness issued by the clerk of the court or a foreman of a grand jury is a valid claim against the county from the date of the issuance of the certificate, **Gray v. Abbot,** 130 Ala. 322. All of the claims now being presented were issued by the clerk of the court or the foreman of the grand jury more than twenty years ago, so that on the authority of

Henry v. State supra, these claims are conclusively presumed paid and are now invalid and cannot be registered for payment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 1, 1938

Hon. Howell Turner,
Secretary of State,
Capitol.

Registrars—Board of Registrars in counties coming within the terms of Act No. 155, General Acts 1936, page 174, approved April 21, 1936, must meet each year on the first Monday in July and remain in session five days, in accordance with the terms of said act, notwithstanding the fact that the first Monday in July of a particular year be a legal holiday.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 9, 1938, which follows:

"Act No. 155 of the 1936 Acts, found on page 174, provides for the Boards of Registrars in certain counties meeting for five days beginning on the first Monday in July for the purpose of registering voters. This year the 4th of July, a legal holiday, falls on the first Monday in July. Please advise if the Boards of Registrars should, in view of these circumstances, meet on Tuesday, July 5th, and continue through Saturday, or should they meet on Monday, July 4th, which is a legal holiday."

Section 9215 of the Code of Alabama, 1923, reads as follows:

"HOLIDAYS; PAPER DUE ON; DUE NEXT SUCCEEDING BUSINESS DAY.—Sunday, Christmas day, the first day of January, Robert E. Lee's birthday, the nineteenth day of January; the twenty-second day of February, Thomas Jefferson's birthday, April the thirteenth; Mardi Gras, the twenty-sixth day of April, Jefferson Davis' birthday, the third day of June; the fourth day of July, the first Monday in September, Fraternal day, the second Tuesday in October, Armistice day, the eleventh day of November, and the day designated by the governor for public thanksgiving, shall each be deemed a holiday. If Christmas day, or the first day of January, or the nineteenth day of January, or the twenty-second day of February, or the thirteenth day of April, or the twenty-sixth day of April, or the third day of June, or the fourth day of July, or the eleventh day of November, falls on Sunday, the Monday following is the holiday. If any paper entitled to days of grace, by the allowance thereof, or subject to protest, becomes due on a holiday, it must be taken as due on the next succeeding business day."

This section was amended by a 1933 Act in respects not here material. Thus, the Fourth of July is a legal holiday.

Nevertheless, it is my opinion that Boards of Registrars should hold meetings in accordance with the terms of Act No. 155, General Acts 1936, page 174, approved April 21, 1936, each year for a period of five days, beginning on the first Monday in July, even though the first Monday in July of a particular year may be the Fourth of July and consequently a legal holiday.

Speaking to the general question of the effect of legal holidays on official acts, the particular official act there under consideration being a judicial proceeding, the late and lamented Mr. Justice Stone of the Supreme Court of Alabama spoke as follows, in the case of **Belmont Coal & Railroad Company v. Smith,** 74 Ala. 206, at page 213:

> "There is nothing in the argument that Thanksgiving day is dies non juridicus. It was made a legal holiday for commercial purposes. * * * This does not interdict worldly labor or secular pursuits on that day."

This office, in an opinion to Hon. H. W. Clayton, Clerk, Circuit Court, Marshall County, Guntersville, Alabama, under date of March 11, 1935, Office Edition, Vol. 3A, page 5, held that it was optional with each individual as to whether or not he would observe legal holidays, other than Sunday, which he must observe.

Therefore, an official act can be performed on a legal holiday. Since, under the provisions of the above-quoted act of 1936, Boards of Registrars in the counties coming within the terms of said act are required to meet for a certain period beginning on the first Monday of July of each year, and especially in view of the fact that this said act is a later expression of legislative will than the Code section designating, among other days, the Fourth of July as a legal holiday, it is my opinion that these meetings should be held each year in accordance with the terms of said act, for a period of five days, beginning on the first Monday in July, notwithstanding the fact that the first Monday of July of a particular year may come on the Fourth of July, which is a legal holiday. Since the opinion of this office cited herein has not been published in our reports, a copy of the same is enclosed herewith for your information.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 1, 1938

Hon. A. F. Harman,
President, Alabama College,
Montevallo, Alabama.

Alabama College has authority to lease property.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of February 21, 1938, in which you request my opinion as follows:

"Alabama College owns a small triangular plot of ground immediately outside the campus. The Montevallo Girls Scouts organization desires to lease this plot of ground for the purpose of erecting and maintaining thereon a house to be used for Scout purposes. I am disposed as President of the College to recommend to the Board of Trustees that this plot of ground be leased to the Girls Scouts for a period of ninety-nine years on receipt from the Scouts of one dollar and for other valuable considerations. It is contemplated that the lease will provide that the property revert or inure to the College in the event that at any time it ceases to be used for Scout purposes and further that the use of the house for other purposes will be subject to the approval of the Board of Trustees of the College.

"The premises considered, please to advise me if in your opinion the Board of Trustees of the College have the authority to grant such a lease to the Girls Scouts organization of Montevallo. Your prompt courtesy in this connection will be appreciated."

The Act establishing the Industrial School for Girls (now Alabama College), provides (Act No. 445, Act 1893) that the Board of Trustees shall be "a body politic and shall have a common seal, shall sue and be sued, contract and be contracted with, and may own, purchase, sell and convey property, both real and personal."

Section 516 of the 1927 Alabama School Code provides for the leasing of lands granted by Congress to the State of Alabama for the use of Alabama College. I find no other or more definite provision in reference to the leasing of property of Alabama College.

While however, specific authority is not granted for the leasing of lands other than those granted by Congress to the State of Alabama, nevertheless I am of the opinion, that the corporate powers of the institution and the inherent powers of ownership are sufficiently broad to cover the leasing of this property. I suggest that the formalities required by Section 516 of the 1927 Alabama School Code be observed. I also call to your attention to Section 6923, Code of Alabama, 1923, which sets forth the requirements for leases of more than twenty years.

I am not holding in this opinion that Alabama College may make a gift of a ninety-nine years estate in part of its property, but I am merely passing on the lease as being for good and valuable consideration as set forth in your statement of facts.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 2, 1938

Hon. Woolsey Finnell,
Tax Collector,
Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—Taxes assessed to life tenant—Section 241—Revenue Act. (General Acts of 1935, p. 256).

1. Taxes assessed to a life tenant who died, and owned no personal property or other assets out of which taxes could be collected,

should be returned on the "list of insolvents." Section 178, General Acts, 1935, p. 256.

2. The death of life tenant of real property in December, 1937, does not subject fee of remainderman or reversioner to taxes assessable October 1, 1937.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of February 3, 1938, as follows:

"I wish your opinion to guide me in handling the matter of taxes assessed against real estate owned by a life tenant who died after the beginning of the tax year.

"On July 27, 1932, Honorable Thomas E. Knight, Jr., Attorney General, wrote Judge W. W. Brandon, Probate Judge of Tuscaloosa County, Alabama, an opinion that

> 'The sale, for the payment of taxes of real estate assessed to a life tenant thereof, does not, in any way, affect any right, title or interest of the reversioner or remainderman, whether bought by an individual or the State.'

"I am informed that W. J. Barnes of Tuscaloosa owned a life estate in Lots 1 and 2 of Block 1 of Tuscaloosa and Castle Hill Real Estate & Manufacturing Company Survey. He acquired this life estate by the right of courtesy from his deceased wife, who died without a will some years ago and who was the owner of this property. W. J. Barnes died during December, 1937, and this property was assessed to Mr. Barnes for 1937 and also for 1938, the 1938 tax year having begun October 1, 1937, prior to Mr. Barnes' death in December, 1937.

"Since Mr. Barnes has already died and since no tax title based on his ownership would pass any title to the remainder interest in this property, which now constitutes the full title after Mr. Barnes' death, I see no reason to sell this property at tax sale for 1937 taxes, as Mr. Barnes former life tenant to whom this property was assessed for 1937 died in December, 1937.

"Please advise me my duties concerning 1937 taxes on this property, since Mr. Barnes left no personal property, and should the 1937 taxes be charged off or abandoned as uncollectable?

"Also, what should be done about the 1938 taxes which became a lien on the property several months before the death of the life tenant, W. J. Barnes, and should 1938 taxes be charged off as uncollectable?

"It appears that to sell Mr. Barnes' interest is all that could be done, and since his interest terminated with his death in December, 1937, it seems that it would be unnecessary and useless trouble and expense and confusion to undertake to make any sale on account of 1937 or 1938 taxes, since under Mr. Knight's opinion above referred to and the cases therein cited, it appears that no valid or effective sale could now be had for the tax year 1937 or 1938.

"Awaiting your opinion and instructions about this matter, I am—"

It is my opinion that the taxes which were assessed to the life tenant as mentioned in your letter should be returned on the "list of insolvents" (Section 178, Gen. Acts, 1935, p. 256), provided there is no other property belonging to the estate out of which these taxes can be collected. The interest of the reversioner or remainderman is not subject to the taxes which were assessed against the life estate of the life tenant who died in December, 1937. Section 241, Revenue Act, General Acts of 1935, p. 256, provides that the deed of the Probate Judge, conveying property was sold for the payment of taxes, "Shall not convey the right, title, or interest of any reversioner or remainderman therein." In the absence of personal property upon which a lien attaches for the payment of the taxes, or if there are no other assets belonging to the estate of decedent out of which the taxes could be collected, the interest of the life tenant having terminated, it is my opinion that the taxes should be listed as above stated.

With reference to the fee of reversioner or remainderman being taxable for 1937-38 taxes, it is my opinion that said interest is governed by the status of the property on October 1, 1937. This reversionary interest was not taxable on that date. The interest of the reversioner or remainderman ripened into absolute title after October 1, 1937, at the death of the life tenant, and for that reason, such fee is not taxable as of October 1, 1937. Section 31, Revenue Act, General Acts of 1935, p. 256, provides as follows:

> "Section 31. It is the duty of every person in every election precinct to attend in person before the Assessor on the first day of the appointment in the precinct of the taxpayer's residence, and then and there render to the Assessor under oath a full and complete list of all property of which he was owner, or in which he had any interest whatever, or of which he was trustee or agent **on the first day of October of that year,** and to enter upon such paper the amount of fire insurance carried upon any of the property so listed."

It appears from your statement of facts that the reversioner or remainderman did not own a taxable interest on October 1, 1937, and for that reason no taxes can lawfully be levied on said property for the tax year 1937-38.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 2, 1938

Hon. S. M. Cobb,
Clerk of the Circuit Court,
Wilcox County,
Camden, Alabama.

Justice of the Peace not entitled to a commission on fines collected for violations of the Game Laws.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you request my opinion as follows:

Is a Justice of the Peace entitled to a 5 per cent commission on fines collected for violations of the Game Laws?

In my opinion your question should be answered in the negative. I have been unable to find any statute authorizing a justice of the peace to charge a commission on fines collected.

Section 3734 of the 1923 Code, provides as follows:

"Section 3734. NO FEE CHARGED UNLESS EXPRESSLY AUTHORIZED.—The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by the law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

Before a justice of the peace would be entitled to charge a commission on fines collected, it would be necessary for him to point to some statute authorizing said charge.—**State ex rel. Holcombe, Sheriff, v. Stone, County Treasurer,** 232 Ala. 16, 166 So. 602; **Troup v. Morgan County,** 109 Ala. 162, 19 So. 503.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 8, 1938

Hon. C. B. Rogers, President,
State Board of Administration,
CAPITOL.

State Board of Administration—

Board has no authority to act as purchasing agent for the several counties of the State.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Section 13 of Senate Bill No. 101 creating the State Board of Control and Economy, approved February 13, 1919, reads as follows:

" 'That the board of control shall also be the purchasing agent with like power for the purchase for the counties of the State, of stationery, books, blank books and office supplies and also shall be purchasing agent for blank books, stationery, office supplies and material for use in the several State offices, departments, commissions, bureaus and boards other than for the use of the supreme court, the court of appeals, and the State and supreme court libraries. Provided the said board of control shall make purchases for the several counties of the State only when and only to the extent that it may be authorized to do so by the action of the court of county commissioners, board of revenue or other governing body of the county.'

"House Bill 177 approved February 10, 1923 amending the Act referred to above has no provision regarding the purchase of supplies for

the various counties of the State by this Board. We have been requested to purchase some automobile tires by the Purchasing Agent of Jefferson County, Alabama, and we will thank you to advise us whether or not Section 13 of Senate Bill No. 101 approved February 13, 1919 is still in full force and effect. We will also thank you to advise us whether or not it is necessary that this Board be furnished with a copy of a resolution by the Board of Revenue of Jefferson County requesting the State Board of Administration to make the purchase above referred to should Section 13 of Senate Bill No. 101 be in full force and effect."

In my opinion there is no authority in the statutes now effective to authorize the State Board of Administration to act as purchasing agent for the several counties of the State.

Acts 1919, page 43, Section 13, is quoted in your request for opinion. This act was amended at the same session to enlarge the powers of the State Board of Control and Economy. Acts 1919, page 1117.

By Acts 1923, page 67, the Legislature undertook to rewrite the 1919 Acts, and to substitute the former for the latter. In the former statute, the provision of the latter authorizing the State Board of Control and Economy to act as purchasing agent for the counties was omitted. **Allgood v. Sloss-Sheffield Steel & Iron Co.**, 196 Ala. 500.

Upon the codification of these provisions (Code of Alabama, 1923, Sections 22-54, inclusive), the 1923 statute was adhered to, and nothing appeared in the code provisions which purported to authorize the State Board of Administration (by which name the State Board of Control and Economy was thereafter to be known and called) to act as purchasing agent of the several counties of the State. **State v. Towery**, 143 Ala. 48.

In the absence of statutory authority therefore, I conclude that the State Board of Administration has no authority to act as such purchasing agent for the counties.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

County Courts—Costs and fees are governed by first portion of Section 3758 of the Code of Alabama, 1923. The last three paragraphs contained in said section have no field of operation and should be disregarded.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 30, 1938, which is as follows:

"Please refer to Section 3758, Code of 1923, pertaining to Fees in Prosecutions before the County Court, which Section quoted supra provides in part as follows:

'For trial, entering judgment and when an appeal is taken, approving bond and certifying proceedings ..... $5.00.'

'If the Warrant of Arrest is not issued by him, then for all services in each case ..... $3.00.'

"The above provisions being in apparent conflict, please advise what fee should be charged for services rendered by the Judge of the County Court as indicated by the above quoted provisions of law."

In answer to your inquiry, I am of the opinion that the proper fees chargeable are those set out in the Schedule of fees in the first portion of Section 3758 of the Code of Alabama, 1923. The last three paragraphs of said section have no field of operation and therefore should be treated as surplusage and disregarded.

The Code section under consideration seems on its face to present an apparent conflict. Therefore, it is necessary to review the legislative history of said section to ascertain the true legislative intent. In dealing with the fees of the county courts, the Code of Alabama of 1907 provided as follows:

Section 6655. FEES IN COUNTY COURT.—In prosecutions before the county court, the following fees shall be allowed for the services specified, and none other—that is to say:

"For taking affidavit of complainant and issuing warrant of arrest $1.00

"For taking and approving bail bond ..... .50

"For issuing each subpoena or notice ..... .25

"For each order of continuance ..... .50

"For trial, entering judgment, and, when an appeal is taken, approving bond and certifying proceedings 5.00

"For judgment on forfeited undertaking of bail 3.00

"For judgment against defaulting witness 2.00

"For serving warrant of arrest when bail is given 1.00

"For serving warrant of arrest when bail is not given, and carrying defendant to court or to jail 2.00

"For serving each subpoena or notice ..... .50

"The fees above specified shall be taxed against the defendant on conviction, or against the prosecutor under the provisions of section 6722 (4619), and if not paid presently, may be collected by execution; but no fee shall be taxed for services not rendered.

"The fees taxed for services performed by the county court, or by the judge of said court, belong to the county, and, when collected, shall be paid into the county treasury; and the fees taxed for all other services shall be paid to the officers by whom the services are performed."

"Section 6656: SAME: FEES OF JUDGES TO BE PAID OUT OF COUNTY TREASURY.—The judge of the county court shall receive

no other compensation than the following fees, which shall be paid out of the county treasury—that is to say:

"If the warrant of arrest is issued by him, then for all the proceedings had before him in each case, including bond and certified copy of proceedings on appeal $4.00

"If the warrant of arrest is not issued by him, then for all services in each case 3.00

"If the warrant is issued by him and a demand for jury is made 2.00

"For each judgment against a defaulting witness, or on forfeited undertaking of bail ..... 2.00"

It will be seen from the above that Section 6655 provided a schedule of fees chargeable in the county court, of the amounts collected under Section 6655. The amounts set out in Section 6656 were the personal fees or compensation of the judge of the county court, who was at that time on a fee basis. Both sections had a field of operation.

The legislature in its 1919 session enacted Act No. 707, S. 549, approved September 29, 1919 (General Acts, 1919, p. 1030), which act is as follows:

"That in prosecutions before the county court the following fees shall be allowed for the services specified, that is to say: where the services are performed by the judge of the county court the following fees shall be taxed: For taking affidavit of complaint and issuing warrant of arrest $1.00. For issuing each subpoena or notice .25. For each order of continuance .50. For trial, entering judgment and when an appeal is taken, approving bond and certifying proceedings $5.00. For judgment on forfeited undertaking of bail $3.00. For judgment against defaulting witness $2.00. The sheriff shall receive the same fees as are allowed by law to him for similar services performed in the Circuit Court including guard fees where defendants are confined in jail. The Clerks of the Circuit Court who by law shall be made ex-officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the Circuit Court. Witnesses shall receive the same pay and allowance for mileage as in the Circuit Court. Solicitors fees shall be the same as for similar services rendered in the Circuit Court. The fees above specified shall be taxed against the defendant on conviction or against the prosecutor under the provision of Section 6722 of the Code, and if not paid presently, may be collected by execution. The fees taxed for services performed by the judge of the county court belong to the county and fees for services of solicitors belong to the county, and shall be paid, when collected, into the county treasury; fees of witnesses and fees taxed for services of other officers shall be paid to the witnesses and to the officers by whom the services are performed. The fees of witnesses, clerks and sheriffs in all cases where no conviction is had shall be governed by the provisions of law applying to similar services in the Circuit Court or in preliminary proceedings.

" '2. This Act shall not repeal an Act entitled "An Act to require all the fees collected by Sections 6655 and 6656 of the Code, in the county court to be paid into the county treasury; to provide a fund out of which the salaries of the judges of the county court shall be paid, and to fix the amount of such salaries", approved September 18, 1915;

and shall not repeal any act, local, general or special, passed by the Legislature of 1919 to fix the salary of the judge of the county court. All other laws or parts of laws in conflict herewith are hereby expressly repealed.'

Approved September 29, 1919."

The Act of 1915 approved September 18, 1915, referred to in the 1919 Act, supra, provided that all fees collected by the judge of the county court be paid into the county treasury and provided a schedule of salaries varying with county population in lieu of fees. Section 2 of the 1915 Act with slight revisions was carried forward in the 1923 Code as Section 3802.

The 1915 Act, supra, had the effect of repealing Section 6656 of the Code of 1907, supra, in that the fees collectible were to be paid into the county treasury and the judges of the county court given a salary compensation in lieu thereof. This fact was recognized in the 1919 Act, supra.

Section 3758 of the Code of 1923 adopted the 1919 Act, supra, together with part of Section 6656 of the Code of 1907. Said Section 3758 is as follows:

"Section 3758—FEES IN COUNTY COURT.—In prosecutions before the county court the following fees shall be allowed for the services specified that is to say: Where the services are performed by the judge of the County Court the following fees shall be taxed:

"For taking affidavit of complaint and issuing warrant of arrest $1.00

"For issuing each subpoena or notice ..... .25

"For each order of continuance ..... .50

"For trial, entering judgment and when an appeal is taken approving bond and certifying proceedings 5.00

"For judgment on forfeited undertaking of bail 3.00

"For judgment against defaulting witness 2.00

"For each day's attendance by the sheriff, on such court 2.00

"The sheriff shall receive the same fees as are allowed by law to him for similar services performed in the circuit court, including guard fees where defendants are confined in jail. The clerks of the circuit court who by law shall be made ex-officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the circuit court. Witnesses shall receive the same pay and allowance for mileage as in the circuit court. Solicitors' fees shall be the same as for similar services rendered in the circuit court. The fees above specified shall be taxed against the defendant on conviction or against the prosecutor under the provision of section 3833 (6722) of the Code, and if not paid presently, may be collected by execution. The fees taxed for services performed by the judge of the county court belong to the county, and fees for services of solicitors belong to the county and shall be paid, when collected, into the county treasury; fees of witnesses and fees taxed for services of other officers shall be paid to the witnesses and to the officers by whom the services are performed. The fees of witnesses, clerks and sheriffs in all cases where no conviction is had shall be governed by the provisions of law applying to similar services in the circuit court or in preliminary proceedings.

"If the warrant of arrest is issued by him, then for all the proceedings had before him in each case, including bond and certified copy of proceedings on appeal $4.00

'If the warrant of arrest is not issued by him, then for all services in each case 3.00

"For each judgment against a defaulting witness, or on forfeited undertaking of bail ..... 2.00."

This consolidation seems on its face to present an apparent conflict. However, the legislative history above outlined shows a repeal of Section 6656 of the Code of 1907, supra. It is true that said Section 6656 of the Code of 1907 could have been readopted by incorporation into the Code of 1923, but surely this was not the legislative intent. If it had been intended to readopt Section 6656 of the Code of 1907, supra, and give the judge of the county court personal fees, the 1915 act, supra, would not have been carried forward in substance as Section 3802 in the Code of 1923, supra. In other words, that part of Section 6656 of the Code of 1907, supra, which is the last three paragraphs of Section 3758 of the Code of 1923, supra, is without a field of operation. As the judge of a county court is on a salary and not a fee basis, the fees attempted to be allowed him in the last three paragraphs of Section 3758 of the Code of 1923, supra, which were formerly allowed him under Section 6656 of the Code of 1907, supra, are inapplicable.

The premises considered, it is my opinion that Section 3758 of the Code of 1923, supra, with the exception of the last three paragraphs thereof, governs the fees chargeable in a county court. The last three paragraphs thereof, which were part of Section 6656 of the Code of 1907, supra, have no field of operation and should be treated as surplusage and disregarded.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Costs of transporting insane prisoner when imprisoned for any of the causes set out in Section 4577, Code of Alabama 1923, must be paid by the State of Alabama.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of May 18, 1938 which is as follows:

"Walter H. Roy, a resident of Autauga County was apprehended within the confines of Elmore County charged with a crime in Elmore County. Later while in Jail a physician made proper certificate that this defendant was insane.

"Please advise me whether or not Elmore County could properly pay for the transportation of this patient to Bryce Hospital in Tuscaloosa or whether he should be turned over to the authorities of Autauga County, in which county he has his residence."

You do not state in your letter for what kind of commitment the prisoner was confined in the jail of Elmore County, but assuming that it was for one of the reasons set out in Section 4577, Code of Alabama 1923, I am of the opinion that the costs incurred in transporting this prisoner from Elmore County to Tuscaloosa County must be borne by the State of Alabama and collected therefrom as in the case of removal of prisoners from one county to another.

Sections 4577 and 4580 are as follows:

"4577. Inquisition upon alleged insane prisoner; further proceedings. —If any person in confinement, under indictment, or for want of bail for good behavior, or for keeping the peace, or appearing as a witness, or in consequence of any summary conviction, or by an order of any justice, appears to be insane, the judge of any court of record of the county where he is confined must institute a careful investigation, call a respectable physician and other creditable witnesses, and, if he deems it necessary, may call a jury, and for that purpose he is empowered to compel attendance of witnesses and jurors; and if it be satisfactorily proved that the person is insane, the judge may discharge him from imprisonment and order his safe custody and removal to the hospital, where he must remain until restored to his right mind; and then, if the judge shall have so directed, the superintendent must inform the judge and sheriff, whereupon the person must be remanded to prison, and criminal proceedings be resumed, or he be otherwise discharged.

"4580. Expenses to be paid by the state; when and how state reimbursed.—The cost of removing an insane prisoner to and from the hospital under any of the provisions of this chapter must be defrayed by the state as in case of removal of prisoners from one county to another; and such cost, together with the expenses of such patient in the hospital, may be recovered by the state from such person, or his estate, or any relative who would have been bound to provide for and maintain him elsewhere."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. A. H. Collins,
Superintendent of Education,
Montgomery, Alabama.

School Funds—Under Act No. 204, H. 584, approved July 11, 1935, (General Acts 1935, p. 596) Montgomery County Board of Education has authority to spend school funds for paying the fee of $10.00 per high school for membership in Southern Association of Colleges and Secondary Schools, and for providing professional educational magazines for school libraries.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you state:

"On December 17, 1934, the Attorney General's office rendered an opinion to Mr. Raymond E. Thomason, Member of the Jefferson County Board of Education, Birmingham, Alabama, in which it was held that the county board of education did not have the authority to pay the membership fee of high schools in the Southern Association of Colleges and Secondary Schools. Reference was made in that opinion to the fact that the Attorney General's office had previously held on May 20, 1929, that school funds could not be used for paying membership dues in the Alabama Education Association and to pay subscriptions to educational publications.

"Attention is called to Act No. 204, approved July 11, 1935. That act applies specifically to the Montgomery County Board of Education. In Section 1 of this act is contained the following statement: 'And the Board shall be authorized to use all monies received by said Board for any and all school purposes.' "

You request my opinion as follows:

"1. Does the Montgomery County Board of Education have the authority to spend school funds for the purpose of paying the fee of $10 per high school for membership in the Southern Association of Colleges and Secondary Schools?

"2. Does the Montgomery County Board of Education have the authority to spend school funds for the purpose of purchasing professional educational magazines for school libraries?"

In my opinion your questions should be answered in the affirmative.

Act No. 204, H. 584, approved July 11, 1935, (General Acts, 1935, p. 596) provides in part as follows:

"* * * **And the Board shall be authorized to use all monies received by said Board for any and all school purposes.** * * *" (Italics supplied).

In the case of **Peter v. Kaufman,** 38 S. W. (2nd), p. 1062, the Supreme Court of Missouri in 1931, held that the term "school purposes" in a constitutional provision limiting the rates of taxation covered all the usual and ordinary expenses of maintaining and operating schools.

In my opinion the "usual and ordinary expenses of maintaining and operating schools," means the usual and ordinary expenses of maintaining and operating schools in an efficient manner and according to existing standards.

For the high schools to be members of the Southern Association of Colleges and Secondary Schools would certainly increase the efficiency of the teaching personnel and the standard of the school system.

The addition of professional educational magazines to the school libraries, would make the libraries more useful to the pupils as well as the teachers.

It is, therefore, my opinion that the Montgomery County Board of Education may spend school funds for paying the fee of $10.00 per high school for membership in the Southern Association of Colleges and Secondary Schools, and for purchasing professional educational magazines for school libraries, as such expenditures would be for school purposes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. R. A. Polglaze, Secretary,
Board of Registration for Professional
Engineers and Land Surveyors,
1118 Webb Crawford Building,
Birmingham, Alabama.

Engineers and Land Surveyors—Under Act No. 271, S. 182, approved September 2, 1935, (General Acts 1935, p. 661) the Board of Registration for Professional Engineers and Land Surveyors may deny certificate of registration to an applicant if he is guilty of any offense set out in Section 22 of said Act which authorizes revocation.

Opinion by Assitant Attorney General Screws:

Dear Sir:

I have your letter of March 29, 1938, which is as follows:

"Act No. 271, Alabama General Laws, Regular Session, 1935, which said Act created the State Board of Registration for Professional Engineers and Land Surveyors and stipulated the qualifications required for registration.

"Section 22—Revocations and Re-issuances of Certificates, provides the Board shall have the power to revoke the Certificate of Registration of any registrant who is found guilty of: (a) The practice of any fraud or deceit in obtaining a certificate of registration: (b) Any gross negligence, incompetency, or misconduct in the practice of professional engineering or land surveying as registered professional engineer or land surveyor.

"Section 12. Among other things reads in part as follows: That no person shall be eligible for registration as a professional engineer, or land surveyor, who is not of good character and reputation.

"I am authorized to write you for a ruling on the following question:

" 'Can the Board deny registration to an applicant if the Board's investigation of the applicant's qualifications for registration develops the fact that he is guilty of one or more of the things stated in Section 221, i. e., gross negligence, incompetency, or misconduct, which constitutes, under said Section grounds for revoking the certificate of a person already registered.' "

I am of the opinion that your inquiry should be answered in the affirmative.

Act No. 271, S. 182, approved September 2, 1935, (General Acts 1935, p. 661) is an Act to regulate the practices of professional engineering including land surveying: creating a State Board of Registration for Professional Engineers and Land Surveyors; defining its powers and duties; also imposing certain duties upon the State and political subdivisions thereof in connection with public work; providing penalties.

Section 12 of said Act provides for the general requirements for registration including professional qualifications. Said section further provides in part as follows:

"* * * Provided, that no person shall be eligible for registration as a professional engineer, or land surveyor, who is not of good character and reputation."

Section 22 of said Act, provides for the revocation and re-issuance of certificates. Said section provides in part as follows:

"Section 22—REVOCATIONS AND RE-ISSUANCES OF CERTIFICATES.—The Board shall have the power to revoke the certificate of registration of any registrant who is found guilty of: (a) The practice of any fraud or deceit in obtaining a certificate of registration; (b) Any gross negligence, incompetency, or misconduct in the practice of professional engineering or land surveying as a registered professional engineer or land surveyor.* * *"

In my judgment, if an applicant is guilty of any offense set forth in Section 22, supra, he would not be a person of good character and reputation as considered in Section 12, supra. Moreover, it would be useless to grant to such an applicant a certificate of registration which could be immediately revoked. The best and most logical manner for handling such a situation would be to refuse the isuuance of certificate of registration in the first instance.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. W. M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Deed Taxes—Mortgage Taxes—instrument purporting to retain title in vendor as security for debt held subject to both deed and mortgage tax.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

You request my opinion as follows:

"Examine the enclosed note and say what tax should be collected.

We can of course see that a mortgage tax is due, but can not see how there could be a deed tax."

You enclose the following instrument in blank.

$..... Selma, Ala. ..... 19 .....

On or before ..... 19 ..... for value received, I promise to pay Riley Chevrolet Company or order the sum of ..... Dollars with interest until paid at 8 per cent, from date, at the peoples Bank & Trust Co.

If this note is not paid at maturity, I also agree to pay all expenses, including reasonable attorney's fee, incurred in collecting by suit or otherwise, it is expressly agreed that the title to the ..... Motor No. ..... Serial No. ..... for which this note is given is and

shall remain in RILEY CHEVROLET CO., until said machine is paid for in full. This is one of a series of ..... Notes aggregating $..... in all and if default is made in payment of this note or either of said series of notes then said company may at its option take possession of said machine and sell same at public or private sale, without notice, and I hereby agree to pay any balance remaining unpaid after net proceeds are applied. Should said property for which this note is given be lost, burned or otherwise destroyed before payment of this note, I nevertheless promise to pay same. If this note remains unpaid for fifteen days after maturity, all of the series of notes given for said machine shall, at the option of said Company, become due and payable immediately; time is of the essence of this contract. All homestead and other exemptions of this State of the United States are hereby expressly waived. The endorsers, sureties and guarantors severally waive presentment for payment, protest, notice of non-payment and diligence.

Post Office, ... Ala.
..... (seal)
County .....

..... (seal)
Witness to signature .....

In reply I wish to advise you that in my opinion both a mortgage and a deed tax must be paid upon this instrument when offered for record. I wish to refer you to the case of **Thompson, Probate Judge, v. Smith** 174 So., p. 796, 797. In this case Judge Foster writing for the Supreme Court holds as follows:

> "Taxation—Where there is contract of sale of realty or personalty by which either the title is reserved in the vendor as security for debt or by which title passes and what is known as lien is reserved as security and such instrument is offered for record, both mortgage tax and deed tax must be paid (Gen. Acts 1935, pp. 456-458, 477, Vol. 348 Schedule 46, 94)."

In my judgment the instant question is completely answered by the holding of Judge Foster in the above named case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. A. H. Collins, Superintendent,
Department of Education,
Montgomery, Alabama.

Schools—State Board of Education has authority to make either examinations or college credentials the only basis for the issuance of teachers' certificates.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of January 26th which is as follows:

"Please advise me whether, under Article XVII of the Alabama School Code, the State Board of Education has authority, at its discretion, to make either examinations or college credentials the only basis for the issuance of teachers' certificates, or is required to retain both examinations and college credentials as bases for the issuance of such certificates. Your attention is called particularly to sections 340 and 343 of the School Code."

Your request requires a construction of Section 343, Alabama School Code of 1927 which is in pertinent part as follows:

Section 343. BASIS OF CERTIFICATES ISSUED.—Certificates hereafter to be granted shall be those based upon credentials showing the academic and professional or the special training of the applicants, or such certificates issued on the basis of examination of the applicants, as may be authorized and prescribed under rules and regulations approved by the State Board of Education; * * *." (Emphasis supplied).

In reading the entire Article XVII, School Code of 1927, it is manifest that the intention of the legislature was to allow the Board of Education to issue teachers' certificates either on an academic credential basis or on an examination basis.

In my opinion the State Board of Education is authorized to make academic credentials the only basis for a teacher's certificate or to make an examination the only basis.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Section 41, Revenue Act of 1935.

(1) Tax assessor must collect 50c demand fee for making demand on delinquent taxpayer.

(2) Postage on registered demand is not taxable against taxpayer.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge receipt of your letter of March 31, 1938, which is as follows:

"Will you please render an opinion, as quickly as possible, on Section 41, General Revenue Acts of 1935, as to whether or not it is obligatory that the assessor charge the 50c fee for making a demand on the taxpayer after the 31 of December. Also whether or not he is obliged to charge the 25c fee for a registered notice."

Your first inquiry should be answered in the affirmative. This office, in an opinion to Hon. M. K. Marshall, Tax Assessor, Randolph County, rendered under date of March 7, 1936, held that the 50c demand fee must be charged by the tax assessor where said assessor has made demand. For your information, I am enclosing herewith a copy of that opinion.—**Quarterly Report, Vol. II, p. 280.**

In my opinion your second inquiry should be answered in the negative. There is no provision for taxing the postage of a registered demand against the taxpayer. A demand by this method is merely a matter of administration and in nowise intended to be a penalty.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. A. H. Collins, Superintendent,
State Department of Education,
Montgomery, Alabama.

Schools—County Board of Education or City Board of Education has authority to employ professional assistance in making up curriculum.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of February 28, 1938, which is as follows:

"County and city boards of education throughout the State of Alabama in cooperation with the State Department of Education are undertaking a study of the curricula now being offered in the public schools of the State. This study involves an analysis of the present offering, experimentation to determine the validity of new proposals, the reorganization of courses of study, and many other professional and technical procedures. The personnel of the State Department of Education is limited. Therefore, the various school systems of the State have found it necessary to call upon the several institutions of higher learning for professional assistance. No special appropriation is made to the institutions of higher learning to render this service. Therefore, county boards of education are required to pay the institutions of higher learning for the services of curriculum consultants, if those services are secured. The improvement of the curricula of the public schools benefits all of the children of the State. It definitely promotes the equalization of educational opportunity. Therefore, I am asking your opinion concerning the following:

"Is it legal for county and city boards of education to pay for the services of curriculum consultants employed for the purpose of improving the offerings of the public schools?"

In reply to your inquiry, I am of the opinion that a County Board of Education or City Board of Education has authority to employ curriculum consultants for the purpose of improving the offerings of its public schools.

I refer you to an opinion of this office written by the Attorney General (Quarterly Report, Vol. IX, p. 57) wherein it was held that the County Board of Education of Jefferson County has authority to pay the traveling expenses of teachers sent to Peabody College to obtain instruction in improving the curriculum of the county schools. Said opinion states in pertinent part as follows:

> "* * * it is my judgment that the County Board of Education of Jefferson County is authorized to pay the actual and necessary expenses incurred by teachers in improving the curriculum of the Jefferson County Schools, and that such expenses may be paid from the proceeds of the three-mill county-wide tax, which tax is voted for public school purposes."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. C. H. Keller,
Register, Circuit Court,
Cullman County,
Cullman, Alabama.

Witnesses who appear in equity case and testify before a commissioner who is authorized to take testimony, are entitled to their pay on the certificate of the commissioner that they appeared and testified. This is true whether they appear voluntarily or by subpoena from the commissioner.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 25, 1938, in which you request my opinion as follows:

> "1. In Chancery cases where the testimony of the witnesses is taken before a commissioner appointed by the Court, and the witness does not prove his attendance within five days after the trial of the case, but the commissioner certifies that such witness is entitled to a certain witness fee, in such case, should witness fees of this nature be charged as a part of the cost in the case?
>
> "2. In Chancery cases where a witness appears voluntarily without subpoena before a commissioner appointed by the Court and testifies at the trial of the case, and the commissioner certifies a witness fee, is such witness entitled to the witness fee?
>
> "3. In Chancery cases where a witness appears voluntarily before the Court without a subpoena, is such a witness entitled to claim for witness fee?
>
> "4. In Chancery cases where summons is issued for witness, but same is not served upon him by the Sheriff, and such witness appears voluntarily before the Court, is such witness entitled to claim for witness fee?

Answering your first inquiry, my answer is in the affirmative. Where the testimony is taken before a commissioner in an equity case, the costs of the witness are chargeable only on the certificate of the commissioner. He simply certifies that the witness attended before him and testified. The commissioner is without power to issue him a certificate of attendance. See Section 7761, Code of Alabama, 1928, (Michie).

My answer to your second, third and fourth requests is also in the affirmative. See Section 7761, supra, you will note this section says among other things; "Witnesses who attend and testify, with or without subpoena, are on the certificate of the commissioner of the distance traveled and the number of days' attendance, entitled to the same compensation as other witnesses."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. William D. Peeler,
Register, Circuit Court,
Lauderdale County,
Florence, Alabama.

When a suit in equity is dismissed without prejudice and the costs are adjudged against the complainant, the respondent in the suit may bring a second suit for divorce without paying the costs and Section 7222, Code of Alabama, 1923, has no application.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 22, 1938, in which you request my opinion as follows:

"I have had several cases and have some now in which Complainant would file suit and said suits would be dismissed without prejudice and later Complainant or the Respondent would file suit again and particularly is this true in divorce suits.

"I would like to know, if a Complainant in a divorce suit would be required to pay the costs in a cause in which he was respondent in a former divorce suit, which has been dismissed at cost of Complainant or in other words does Section 7222 of the 1923 Code of Alabama, apply in a case of this nature?"

In regard to your inquiry as stated in your second paragraph, the complainant in the second suit, who was respondent in the first suit, would not have to pay the cost of the former suit before bringing of his suit for divorce unless the judge rendering the decree had adjudged the costs against him as respondent in the first suit. My answer to your inquiry is in the negative, as the costs were not adjudged against him in the first place, but were adjudged and decreed against the complainant in the first suit who is now the respondent in the second suit.

Section 7222, Code of Alabama, 1923, to which you refer, does not apply in this particular case for the reason the costs in the original suit were adjudged against the complainant and not against the respondent, and in the second suit the complainant was the respondent in the original suit.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
CAPITOL.

Motor Bus—All seats be counted in determining the seating capacity of a motor vehicle used for transporting passengers.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"We will appreciate it if you will, at your earliest convenience give us your opinion on the following subject:

" 'On November 27th, the license inspector of Walker County, cited the Dixie Coaches that operate from Florence to Birmingham for using improper license plates. He states Coach No. 29 and Coach No. 31 had Q-3 tags with a seating capacity of fifteen standard seats and four aisle seats, and on Coach No. 37, they had a Q-4 tag with a seating capacity of twenty standard seats and six aisle seats.'

"Please give us your opinion as to whether a bus operating with more than fifteen seats and four aisle seats, making a seating capacity of nineteen, should take a Q-4 tag. And whether a bus having a seating capacity of twenty regular seats, and six aisle seats, making a seating capacity of twenty six should be operated with a Q-5 tag as per Act of the Legislature, General Alabama Acts, regular session 1935 at 1118. Are aisle seats to be counted in determining the price of tag to be used on buses?"

In my opinion the licenses under Schedule 158.3 of the 1935 Revenue Act are based on the seating capacity of the motor vehicle.

Seating capacity as used in this schedule means the maximum number that can be regularly accommodated in said vehicle. In computing the seating capacity, it is my opinion that all seats should be counted, and no distinction made between an aisle seat and a standard seat.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Page S. Bunker,
State Forester,
State Commission of Forestry,
Montgomery, Alabama.

License collected from company making wooden coffins or caskets (Schedule 123½ of Section 348, General Revenue Act of 1935) should be covered into State Forestry Fund.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of May 16, 1938 which is as follows:

"Under Section 1005 of the Code of 1923 all occupation licenses or privilege taxes imposed by the State for engaging in any business dealing with timber or timber products are to be paid into the State Forestry Fund. Under Schedule 123½ of the Revenue Act of 1935 as amended March 2, 1937, each person, firm or corporation engaged in the operation of any factory where lumber or timber is sawed or made into a finished or semi-finished product shall pay a privilege tax. Your opinion is requested as to whether a concern whose principal product is wooden coffins or wooden caskets falls within the latter classification and, if so, whether the privilege tax levied on such a concern shall be paid into the State Forestry Fund."

I am of the opinion that all licenses collected under Schedule 123½ of Section 348, General Revenue Act of 1935, should be paid into the State Forestry Fund.

Act 231, General Acts 1936-37, p. 279, supplements the General Revenue Act of 1935 by adding Schedule 123½ to Section 348. It provides a license schedule for:

"Any person, firm or corporation engaged in the operation of a veneer mill, planing mill, post factory, handle factory or any other factory where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill licensed under Schedule 123, * * *"

Section 1005, Code of Alabama, 1923, as amended by Act 23, General Acts 1935, p. 38 and Act 500, General Acts of 1935, p. 1078, is as follows:

"Section 1005. STATE FORESTRY FUND: WHAT CONSTITUTES. All occupation licenses or privilege taxes imposed by the state for engaging in any business dealing with timber or timber products and all fines and forfeitures arising under the provisions of this article shall be paid into said forestry fund. All moneys going into said fund are appropriated to said state commission of forestry for the purpose of administering this article."

From the foregoing, it is evident that it was the legislative intent to cover all funds derived from licenses from the "operation * * * of any factory where lumber or timber is sawed or made into a finished or semi-finished product" into the State Forestry Fund. I am of the opinion that the making of wooden coffins or caskets is included within this classification.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Marriage—Alabama recognizes the common law marriage. The income tax exemption for husband and wife is applicable to common law marriages.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 5, 1938, which is as follows:

"Section 345.14 of the Alabama Income Tax Law enacted in 1935 Subdivision (c) provides that a married person living with husband or wife, shall receive a personal exemption of $3000.00 in filing individual income tax return. As required by law an individual filed with this office returns for the years 1934 and 1935, stating in answer to questions number 2 in regard to his marital status that he was single and claiming exemption of $1500.00 for each year. He later filed with this office petitions for refund supported by amended returns claiming that the original returns were filed in error and that he was in fact a married person by reason of a common law marriage agreement. His petition is based on the following statement:

" 'During the entire calendar years of 1934 and 1935, I was living under a common law marriage, supporting my wife and her daughter under 18 yrs. of age. I was not aware of the fact that the State of Alabama recognize a common law marriage, therefore when my income tax returns for the above years were prepared my marital status was reported as single and no credit claimed for dependents.'

"An opinion is requested as to whether or not a common law marriage is recognized under the Alabama law for the purpose of fixing a personal exemption for income tax purposes."

I am of the opinion that your inquiry should be answered in the affirmative. It has long been settled that Alabama recognizes a common law marriage.—**Woodward Iron Company v. Dean,** 217 Ala. 530, 117 So. 52; **Hill v. Lindsey,** 223 Ala. 550, 137, So. 395;**Rogers v. McLeskey,** 225 Ala. 148, 142 So. 526; **White v. White,** 225 Ala. 155, 142 So. 524. The common law husband and wife in my opinion, occupies the same marital status as those who were married by proper legal license and ceremony.

The exemption referred to in Section 345.14 of the Alabama Income Tax Law refers to husband and wife. The term husband and wife, as therein used, in my opinion, includes common law husband and wife.

Of course, it is a matter of proof whether or not persons are husband and wife by common law marriage. The rules as to the necessary proof are discussed in the case above cited.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Roy Sanderson,
Judge of Probate,
Marion County,
Hamilton, Alabama.

Licenses—A person dealing in witness script must pay state and county licenses in each county in which he engages in such business.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 8, 1938, which reads as follows:

"Please give me an immediate opinion on the following:

"Under Schedule 153, License Laws of Alabama, a man has paid a State and County license in Walker County, Alabama, to buy witness script, and he attends the courts in this County, Marion, and buys witness script in this county. He claims that the license required is similar to that of an attorney, and he does not have to pay a license in this county.

"I want your opinion as to whether I should collect from him the State license and county license in this county. This county, by order of Commissioners Court on the minutes, requires that when a State license is collected there shall be collected an additional license for the county of one half the state license.

"The party buying the witness script in this county has been cited by the License Inspector, and I want your opinion as soon as possible in order to deal with him as the law requires."

The license of persons dealing in witness script is levied by Schedule 153 of the 1935 Revenue Act, which reads as follows:

"Each person dealing in witness script, One Hundred Dollars ($100.00)."

Of course, there is also levied by the 1935 Revenue Act for the use of the county 50 per cent of the amount fixed by Schedule 153, supra, for county license. Subparagraph (b) of Section 350 of the 1935 Revenue Act reads:

"(b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

As to the question of whether or not a person dealing in witness script in more than one county must pay the above licenses in each county in which he so deals in witness script, we refer you to subparagraph (a) of Section 350, supra, which provides:

"(a) Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided."

The person mentioned in your letter is required to pay these licenses for privilege of dealing in witness script. He deals in witness script in more than

one county, and it may be said, therefore, that he has a place of business in each county in which he deals, even though he might not actually have an established place of business in any county. Therefore, it is my opinion that he should pay the state and county license provided for persons dealing in witness script in each county in which he so engages in business. Cf. opinion to Hon. W. G. Little, Judge of Probate, Sumter County, Livingston, Alabama, under date of November 29, 1935, Quarterly Report of Attorney General, Vol. I, page 255.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Homestead Exemption—

A person who has paid the entire purchase price on a homestead and occupies the same without a fee title is entitled to exemption from State taxation thereon.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letters of recent date wherein you request my opinion as follows:

"A purchaser of a house puts up the entire purchase price on August 10, 1937 and moved in on September 1, 1937. However, there was some flaw in the title which had to be cleared up through the Chancery Court and up to the present, these matters have not been entirely cleared and chancery court deeds signed in favor of the purchaser. However, the purchaser has paid his money, has possession of the property and both parties made the contract to bind the sale.

"Is the purchaser entitled to pursue a homestead exemption?"

Your question should be answered in the affirmative. The courts of this State have held, "It is not necessary that the claimant of a homestead own a legal title thereto. It is sufficient if he has an interest which is less than an estate in fee." **Tyler vs. Jewitt,** 82 Ala. 93, 2 So. 905. And further, that the nature of a title to a homestead is immaterial. **Booker vs. Booker,** 220 Ala. 367.

The purchaser in the above case can be likened to one in possession of property pursuant to a contract of purchase and the Supreme Court of Alabama has held that such an interest is one upon which a homestead exemption can be granted. **Burrow vs. Clifton,** 186 Ala. 297.

This office in an opinion found in the Quarterly Report of the Attorney General, Vol. VII, p. 68, held that under the constitutional and statutory provisions, a homestead exemption may be claimed in lands which are oc-

cupied and constitute the dwelling place of the family without regard to the nature or character of the title, whether in fee simple, for life or for years only. Further, this principle was reaffirmed in opinions of this office found in Quarterly Report of Attorney General, Vol. VIII, p. 62 and p. 66.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Solomon Baxter, Supt.,
Houston County Board of Education,
Dothan, Alabama.

Houston County—County Board of Education is authorized to pay traveling expenses of County Superintendent. Act 139, Gen. Acts, 1936-37, p. 157.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of June 3, 1938 which is as follows:

"I am writing you to ask for an opinion from your office as to whether or not the Houston County Board of Education has authority to pay expenses of its Superintendent to the National Education Association held at Atlantic City, N. J., February 26, 1938.

"The Board authorized and directed its Superintendent at its regular meeting on February 22, 1938 to attend such meeting. It also authorized the expenses of said Superintendent to be paid.

"The Board has authority under Bill No. 139, House Bill 343-Calhoun to pay traveling expenses incurred by the County Superintendent of Education while on official duty in the County and actual expenses incurred by him while on official duty outside the County. I quote below both resolutions.

"WHEREAS, the Houston County Board of Education desires to bring to its school system the best thought and presentation of education through the Superintendent, and,

"WHEREAS, it is in the best judgment of this Board that its County will be greatly aided by the attendance of the County Superintendent to meetings where the best thought and plans are projected on school problems.

"THEREFORE, be it Resolved that the Superintendent be directed and authorized to attend the National Education Association Superintendent's Section, Atlantic City, N. J. beginning February 26, 1938, in order that the present thoughts and plans may be brought to this County.

"Be It Further Resolved, that the Superintendent's expenses be paid to this meeting.

"WHEREAS, the Legislature of Alabama in extraordinary session 1936-37 made provisions under bill No. 139. House bill No. 343—Calhoun to

authorize and empower Board of Education to pay the traveling expenses incurred by the County Superintendent of Education while on official duty in the County and actual expenses incurred by him while on official duty outside of the County;

"WHEREAS, it is the desire of the Houston County Board of Education to allow Superintendent's traveling expenses,

"THEREFORE, be it resolved that the Houston County Board of Education pay the traveling expenses of the Superintendent at the rate of 5c per mile when personal car is used and the actual expenses incurred when itemized statement of such expenditure is submitted to the Board of Education on forms prepared by the Department of Education and approved for payment by said Board."

I am of the opinion that the County Board of Education of Houston County, has authority under Act 139, General Acts 1936-37, p. 157, to pay the traveling expenses of the County Superintendent of Education under the circumstances outlined above. Section (1) of said Act is as follows:

"The Boards of Education in all Counties in the State of Alabama with a population of not less than 45,300, nor more than 46,100, according to the last or any subsequent Federal Census, where the maximum salary of the Superintendent of Education is prescribed by law are hereby authorized and empowered to fix, approve, and authorized the payment of the traveling expenses incurred by the Superintendent in the performance of his official duties within the County and the expenses incurred by him when his official duties require him to go outside of the County."

According to the Federal census of 1930, Houston County has a population of 45,935.

The maximum salary of the County Superintendent of Education of Houston County is fixed by Act 66, Local Acts of 1931, p. 16.

Therefore, it is my opinion that Houston County falls within the classification set out in Act No. 139, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. R. J. Goode, Commissioner,
Agriculture & Industries,
Montgomery, Alabama.

Act No. 190, H. 106, approved April 21, 1936, Gen. Act 1936, p. 222, known as "the Hare Act", construed.

1. A person engaged in the transporting of cattle for hire from other states along the public highways of Alabama for sale, market or slaughter in Alabama is subject to the license required under the Hare Act.

2. A person who buys animals out of Alabama and transports the same into Alabama for sale, market or slaughter in Alabama, is a dealer under the Hare Act and subject to the license therein.

3. A producer of cattle in other states and in the State of Alabama who transports them along the public highways of Alabama to market is not a dealer under the said Act and is not subject to the license provision thereof.

4. One who buys, transports or resells cattle, for the purpose of grazing, feeding or milking and the one who purchases on the resale for the same purpose, is not subject to the license tax imposed by the Hare Act.

5. One who purchases cattle in another state and brings the same to be marketed in this state must, pursuant to Section 3 of the Hare Act have in his possession the original bill of sale obtained from the owner or seller of the livestock.

6. The licensing provision contained in the Hare Act is a valid exercise of the police power of this state and is not a tax for revenue purposes.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Your opinion in the following matters relating to the Hare Act (Laws of 1936, page 222) is requested:

"(1) Is a person transporting cattle for hire from other states along the public highways of Alabama for sale, market or slaughter in Alabama subject to the license required under said Act?

"(2) Is a person who buys animals out of Alabama and transports the same into Alabama and along the public highways of Alabama for sale, market or slaughter in Alabama subject to this license?

"(3) Is a person who grows such animals in other states and transports them along the public highways of Alabama for sale, market or slaughter in Alabama subject to such license?

"(4) Is a person who grows such animals in Alabama and who transports the same along the public highways of Alabama for sale, market or slaughter in Alabama subject to such license?

"(5) Does Section 5 of said Act apply only to persons who purchase and transport livestock to the premises of said persons for the purpose of grazing, feeding or milking? Does said Section 5 include within the exception as to the application of the Act those who transport from their own premises cattle grown by them to market or for slaughter?

"(6) Does the language of Section 1, namely, 'who engages in the business of transporting, hauling or driving cattle, sheep, goats or hogs along any public road or highway of Alabama for resale, to market, or for slaughter,' include a person who transports cattle produced by him along the highways to market or does it include only a person who buys such cattle and transports the same to market?

"(7) Does this Section require a person bringing cattle into Alabama from another state to have bills of sale for such cattle purchased in another state but marketed in Alabama?

"(8) Is the fee referred to in the Act as a license, an inspection fee levied in the exercise of the Police powers of the State or is it for revenue purposes and therefore a tax?"

1. In my opinion your first question should be answered in the affirmative. By Section 1 of the Hare Act, (Laws of 1936, p. 222) such a person described by you is declared to be a dealer. This section provides in part as follows:

"* * * who engages in the business of transporting, hauling or driving cattle, sheep, goats or hogs along any public road or highway of Alabama for resale, to market or for slaughter. * * *"

And by Section 2 of this act every dealer is required to secure a license to engage in the business as defined by Section 1. You will note that no exception is made in transporting cattle from other states along the highways of Alabama and the provision of the act here applies only to the **transportation** in the State of Alabama.

2. Your second question should be answered in the affirmative. This office has ruled in an opinion found in the Quarterly Reports of Attorney General, Vol. IIII, at p. 130, that a person who goes from place to place and buys livestock which he resells, is a livestock dealer as defined in Section 1 of the Hare Act; and again no distinction is made as to where the animals are purchased, the license here is imposed not on the purchasing but upon the occupation of a dealer. **Quarterly Report of Attorney General,** Vol. VII p. 70.

3. Your third question in my opinion should be answered in the negative. The purpose of the Hare Act is to regulate the business of buying livestock and of reselling the same and in my opinion was not intended to include those who are the producers or growers of the cattle and the mere fact that the grower is from another state and transports the cattle along the public highways of Alabama is not controlling since he is not engaged in the business of transporting cattle.

4. Your fourth inquiry must be answered in the negative, for the same reason in that a grower of cattle is not a dealer and would not come under the provisions of this occupational license.

5. Section 5 of the Hare Act, excepts from the operation of the licensing provision, those who buy, transport or resell cattle, hogs, sheep or goats, when the purpose of the buying, transporting or reselling is for grazing, feeding or milking of such livestock and in my opinion also includes the person or persons to whom the livestock are resold. So that, if the livestock was transported to the premises of the person who originally purchased the livestock and was then resold, but, again for the purpose of grazing, feeding or milking, the provisions of the licensing tax would not apply. It is further my opinion that Section 5 does not include within this exception those who transport from their own premises, cattle grown by them to market or for slaughter however, these people are not subject to the license imposed by this act for the reasons stated above, in that they are not included in the definition of the word "dealer" in Section 1 of the said act and are therefore by implication excluded.

6. The language used in Section 1, "* * * who engages in the business of transporting, hauling or driving cattle, sheep, goats or hogs along any public road or highway of Alabama for resale to market, or for slaughter," does not include a person who transports cattle produced by him, but, these particular words deal only with one who is engaged in the business of

transporting cattle to market. One who buys cattle and transports the same to market would be a dealer under the definition of the word "dealer" contained in Section 1 in the following language:

> "Every person, firm, association or corporation engaged in the business of buying cattle, sheep, goats or hogs for resale or slaughter ***"

7. Your seventh inquiry in my opinion should be answered in the affirmative. Section 3 of the Hare Act provides in part as follows:

> "It shall be unlawful for any dealer, his agent or employee to drive, haul, or otherwise transport any such livestock along or upon any public road or highway in Alabama unless such dealer or his agent or employee shall have in his possession accompanying such hauling or shipment or transportation, the original bills of sale so obtained from said owners or sellers of such livestock so being driven, hauled or transported. ***"

It will be noted that this provides for an inspection of bills of sale for all cattle being transported along the highways of Alabama and would therefore apply to cattle purchased in any state, in that, the inspection would only take place within the State of Alabama, and since the purpose of this act was "to protect owners or lien holders against theft or wrongful sale or removal of such livestock;" (title). It is my opinion that Section 3 will apply to any cattle being transported along the highways of Alabama whether purchased within or without the state.

8. The purpose of the Hare Act as stated in the title is "to regulate the business of buying livestock for resale or slaughter, the business of slaughtering livestock, and the business of transporting, hauling or driving of such livestock along the public highways of Alabama for resale or slaughter; ***" and as above stated was to protect owners of cattle against theft or wrongful sale.

The police power of a state has been defined to embrace "the maintenance of good order, and the preservation of the public morals;" **Beer Co. v. Massachusetts,** 97 U. S. 25, and specifically the police power has been held to extend to the regulation of slaughtering cattle and of the marketing thereof. **Butcher's Union Co. v. Crescent City Co.,** 111 U. S. 752. It is fundamental that the state has the power to license all classes of trades and employments. **Ex Parte City Council of Montgomery,** 64 Ala. 463 and a license tax when imposed as a means of regulation only is a valid exercise of the police power. Where the amount of the license is not unreasonable in amount it is therefore not considered a tax for revenue but for regulation only. **Cooley on Constitutional Limitations,** p. 246; **Ex Parte Marshall,** 64 Ala. 266.

I conclude therefore, from a reading of the above authorities that the provisions for a license fee contained in Section 2 of this act that this valid exercise of the police power of the state and in my opinion is not a tax for revenue purposes although the same is an occupational license. **Quarterly Report of Attorney General,** Vol. VII p. 70 supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Mrs. A. G. Teague,
Clerk Circuit Court,
Ashville, Alabama.

Costs—Copy of transcript provided for by section 6102 of the Code of 1923 held to be appellant's costs and collectible under provisions of Sections 7263 and 6102 of the Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your request under date of January 24, 1938 as follows:

"Kindly give me your official opinion on the following:

"Referring to Sec. 6102 Civil Code of Alabama, 1923, and quoting the following, 'He shall in making the transcript make a copy thereof for the appellee and deliver it to him or his attorney—'. Under the provisions of this Section and the circumstances surrounding an appeal can the cost of making this copy of the transcript required to be furnished the appellee (but not at his request) be taxed as plaintiff's cost and collected for under Sec. 7263, Civil Code of Alabama, 1923, even though the cost was taxed by the Supreme Court against the appellee who was the losing party?"

In reply, I wish to refer you to Section 6102 of the Code of 1923, which provides as follows:

"Section 6102. TRANSCRIPT MADE BY CLERK: FEES FOR—After taking an appeal in the manner herein provided, and filing in the cause a bill of exceptions, or the expiration of the time for filing, such bill of exceptions, or if the appellant sooner direct, the clerk, the register, or judge of probate, as the case may be, shall make out a transcript as required by law, and deliver the same to the appellant. He shall in making the transcript make a copy thereof for the appellee and deliver it to him or his attorney, and for the transcript he shall have ten cents for each one hundred words and for the copy five cents for each hundred words, both of which shall be taxed as costs against the unsuccessful party in the appeal. The appellant shall be entitled to procure a copy of said transcript by paying therefor at the rate of five cents for each one hundred words; provided the appellant make request of the clerk, register, or judge of probate before the preparation of the original transcript."

The transcript required by law, to be made and delivered to the appellee or his attorney, is a part of the costs assessable in the case, and shall be paid by the unsuccessful party, against whom the costs are taxed where such unsuccessful party is not insolvent. I wish to refer you to Section 7263 of the Code of 1923, which provides as follows:

"WHEN EXECUTION AGAINST PLAINTIFF FOR HIS OWN COSTS; PENALTY FOR FAILURE TO COLLECT, ETC. The clerk of the supreme court, court of appeals, clerks of the circuit court, judges of probate, and justices of the peace, and registers, upon return of an execution 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, court of appeals, of the county from which the case was brought, may issue execution against the plaintiff, or against the

plaintiff and sureties, or appellant and sureties as the case may be, for the costs actually created by the plaintiff, or appellant but for none other, to be collected and returned as other executions, Judgment may be rendered on notion in the circuit court of such county, in the name of the clerk or judge of probate issuing the execution, against the sheriff or his sureties, or either of them, upon three days' notice, for dereliction of duty on the part of the sheriff for failing to return, levy, or collect such execution so sued against the plaintiff or against the plaintiff and his sureties for such costs, as follows: Twenty per cent upon the amount of the execution for failing to return the same; for failing to collect the amount of such execution when the same could have been collected by said sheriff by the use of reasonable diligence, the full amount of such execution and ten per cent on the amount thereof as damages; and for failure to pay over the amount collected thereon, less his fees, the full amount of the sum so collected and not paid over, and five per cent per month damages for each month after demand."

It is my opinion that this copy of the transcript may be collected for as appellant's cost when the above quoted provisions of the Code of 1923 are followed strictly.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Where a defendant was convicted and sentenced in 1914 in two separate and distinct cases, the costs in the second case is not payable by the State until the convict begins to serve his second term.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 24, 1937, in which you request my opinion as follows:

"A certain defendant was sentenced on one (1) indictment to twenty (20) years in the penitentiary and on another to five (5) years. The date of both sentences was November 21, 1914 and the order in the second case read in part as follows: 'And it is further ordered by the Court that the sentence in this case shall begin at the expiration of the sentence in case No. 2437' (Case No. 2437 being the twenty (20) year sentence.)

"This defendant went to the penitentiary and died there in 1922, the expiration of his first sentence would have been in 1934. A cost bill has been sent the Convict Department for the costs in the second case on which the convict never began service.

"Is this Cost Bill a legal charge?"

My answer to your request is in the negative.

I notice the defendant was convicted and sentenced in 1914. I call your attention to Sections 6519 and 6575 of the Code of Alabama, 1907, which sections were in force at the time the convict was sentenced, and are as follows:

"6519. TWO OR MORE CONVICTIONS.—When a convict is sentenced to imprisonment in the penitentiary on two or more convictions, the imprisonment on the second, and on each subsequent conviction, must commence at the expiration of the imprisonment on the preceding conviction."

"6575. CLERK MUST SWEAR TO BILL OF COSTS AND FORWARD TO PRESIDENT OF BOARD OF INSPECTORS; LIMIT; HOW PAID. After such conviction, the clerk of the court in which the conviction is had, shall make out a bill of the costs in the case, containing no items not enumerated in the preceding sections; he shall make oath to the correctness of each item of said bill, and that the same is a legal charge against the defendant; he shall forward the bill of costs to the president of the board of inspectors of convicts, or the officer discharging his duties, who shall carefully examine the same, and if found correct, he shall request the state auditor in writing to draw his warrant upon the state treasurer for the payment of said bill to said clerk out of the convict fund. No costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall not be paid until he has served the preceding sentences."

You will note that Section 6575 says that the costs in the second case, where defendant is convicted in two or more cases, is not payable until the defendant starts serving on his second sentence. Therefore, if the convict died while working out his first sentence, then, of course, he can never begin his second. Therefore, the State would never become liable for the costs in the second case.

I am aware that the law on this subject has been changed by the Code of 1923, but this could not affect the case now under consideration, as the present law could not be so construed as to become retroactive and include a case which was disposed of in 1914.—See **Biennial Report of Attorney General, 1918-1920, p. 273.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Mrs. W. Lee Stanley,
Clerk of Circuit Court,
Colbert County,
Tuscumbia, Alabama.

(1) Witness Fees—A witness certificate can only be issued by the clerk of the circuit court where the witness claims the said fees, which claim must be made within five days pursuant to Section 7235, Code of Alabama, 1923.

(2) The clerk of the circuit court is to determine the amount the witness is entitled to for mileage and per diem.

Opinion by Assistant Attorney General Rowe.

Dear Madam:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Section 3763 of the Code of Alabama, 1923, provides in part as follows:

' Section 3763. The fees of witnesses, subpoenaed on the part of the State to appear before—any court in which a criminal prosecution is pending must be taxed against the defendant if he is convicted ...'

"In an considered opinion rendered May 24, 1929, found on page 401, Biennial Report of Attorney General 1928-30, State witness fees in criminal cases are extensively discussed. It is here held that the term 'Subpoenaed' (as it appears in Section 3763) contemplates attendance at court on the part of the witness and that the issuance by Clerk of the subpoena alone will not justify charging the defendant with witness fees, but when the witness attends, it is the duty of the Clerk of the Court to issue a certificate as is provided in Section 3769, Code of 1923, which is quoted in part as follows:

'Section 3769. It is the duty of the Clerk of the Court to issue a certificate to each witness appearing on the part of the State, etc.,'

"It is held in quoted opinion shown above that Section 7235, Code of Alabama 1923, refers only to witnesses in civil cases and in the same opinion it is held that witnesses in criminal cases must prove attendance upon conclusion of cause.

"In Tillman vs. Wood, 58 Ala. 578, the Supreme Court used language as follows:

'For the reason that costs are in the nature of a penalty.'

"It seems to the writer that a witness certificate should be issued to each state witness who appears for the State and that the witness fees be taxed against the defendant and that no authority exists for failing to tax these witness fees against the defendant inasmuch as these costs are in the nature of a penalty. This will have the effect of the Clerk issuing the witness certificate and taxing the cost against the defendant whether the witness claims his fees or not. As it appears that this solution is necessary to comply with the law as laid down in Sections 3763 and 3769. It further seems that the Clerk is called on to determine if the witness has appeared and determine the mileage that he is entitled to and on learning this he should tax the witness fees against the defendant."

Your request for opinion can be succinctly stated as follows:

(1) Whether the Clerk of the Circuit Court is to issue a witness certificate whether or not witness makes claim for his fees.

(2) Whether the Clerk of the Circuit Court is called on to determine if the witness has appeared and to determine the mileage that the witness is entitled to.

Please be advised that the opinion of this office found in Biennial Report of Attorney General, 1928-30, p. 401, referred to in your letter, in which it it stated that Section 7235, Code of Alabama, 1923, refers only to witnesses in

civil cases, has been over-ruled in effect by opinions of this office found in Biennial Report of Attorney General, 1930-32, p. 613, and Quarterly Reports of Attorney General, Vol. IX, p. 50. It is therefore a necessary conclusion that a Clerk of the Circuit Court cannot issue a witness certificate unless the witness makes claim for the same and that this claim must be made within five days after the adjournment of the session of the court at which he attended.

Further, pursuant to Section 3763, Code of Alabama, 1923, the fees of witnesses are only taxable against the defendant when he has been convicted.

Further, it is my opinion pursuant to Section 7234, the Clerk of the Circuit Court must determine whether the witness has appeared and how much the witness is entitled to for mileage and per diem fees. Here again the witness fees can only be taxed against the defendant when he has been convicted. Where the defendant is not convicted, witness fees are taxed as set forth in Section 3763, Code of Alabama, 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. C. H. Keller,
Register Circuit Court,
Cullman County,
Cullman, Alabama.

Bond given for security of costs as provided for in Section 6131, Code of Alabama 1923, does not cover costs which accrued before the taking of the appeal.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of February 26, 1938, which is as follows:

"In a Chancery case where the complainant loses his case in the Circuit Court and the costs are taxed against the complainant and from the decree of the Circuit Court he appeals to the Supreme Court of Alabama and makes appeal bond, which reads in part as follows:

We, J. H. Patterson and sureties, hereby acknowledge ourselves security for all the costs of an appeal taken to the Supreme Court of Alabama by the said J. H. Patterson from a judgment in this cause rendered in favor of respondent and against complainant on the 21st day of July, 1936, in the Circuit Court in Equity in Cullman County, Alabama.

"And to further secure the payment of such costs we and each of us hereby waive all our rights to claim exemptions under the Constitution and Laws of the State of Alabama.

J. H. Patterson (Seal
M. W. Stisher (Seal)
V. S. Stisher (Seal)

"In this particular case the Supreme Court affirmed the decree of the Circuit Court and the costs assessed by the Supreme Court as follows: 'And it was further considered that the Appellant and the sureties on the appeal bond pay the costs accruing on said appeal in this Court and in the court below'.

"The Complainant in this case is insolvent. Are the sureties on his appeal bound liable for the costs accruing in the Circuit Court from the filing of the original bill, including the preparation of the transcript of the record to the Supreme Court, or are they only liable for the costs accruing in the Circuit Court and for the Supreme Court from the filing of the appeal bond? In other words are the bondsmen liable for all the costs in the case including the costs in the Supreme Court, or are they only liable for the costs in the Supreme Court?"

Section 6131 of the Code of Alabama, 1923, is as follows:

"Section 6131. SECURITY FOR COSTS; WHEN REQUIRED.—An appeal may be taken without giving bond to supersede the execution of the judgment or decree, by the appellant giving security for costs of such appeal to be approved by the clerk, register, or judge of probate; the names of the surety or sureties to be certified with the record to the appellate court; and execution may issue against such sureties for the costs in such court and the costs of the transcript, if decided against the appellant."

It is my opinion that the language of the above quoted section is plain and unambiguous and very definitely limits the liability of the sureties on the appeal bond to the costs incurred in the appellate court and in the preparation of the transcript.

In the case of **King and Owens v. McCann,** 25 Ala. 471, motion was made to strike the case from the appeal docket because no bond was given for the appeal nor security for costs. The Circuit Clerk certified that "no bond was required because no costs have been paid." The Supreme Court granted the motion to strike on the ground that the security required by Section 6131 (3041) is not for the costs which have accrued, but for the costs on the appeal.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centreville, Alabama.

Courts of County Commissioners—Probate Judge—(1) Each member of the Court of County Commissioners may supervise and inspect the construction and maintenance of all the public roads in the county when so authorized by the County Governing body and is not limited to either supervision or inspection or as to the roads in his district.

(2) All claims against the county should be paid in the order of their allowance and registration, except claims denominated preferred claims by statute.

(3) The gasoline fund accruing to a County under schedule 156.9 must be used for the construction and maintenance of the public roads and bridges of the county and may be separated and alloted to the separate districts as the Court of County Commissioners may order.

(4) One-third of the gasoline fund accruing to each county may be set aside for the retirement of past due debts for the construction and maintenance of public roads and bridges which must be paid in the order of their allowance and registration.

(5) Courts of County Commissioners may make such rules and regulations not contrary to or inconsistent with the statutes, as they deem necessary in the purchasing of supplies for the county.

(6) Probate Judge, as chairman of the Court of County Commissioners is liable on his official bond for warrants issued by him without authority of law notwithstanding the fact that the claims have been audited and allowed by the Court of County Commissioners.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter which requests my opinion as follows:

"Bibb County is divided into four Districts, each District electing a Commissioner. I desire to have your opinion on the following questions.

"Can the Commissioner supervise as well as inspect roads in his District?

"One District is about $12,000.00 in debt, all the claims being duly filed. Can the Commissioner pay such claims as he desires, or should the money be prorated?

"Can the Commissioners Court separate or allot one-fourth of the Gasoline Fund, regardless of mileage, to each District, or are all obligations against the County to be met out of the Gasoline Fund as a whole.

"Is there a certain amount of Gasoline Fund set aside for retirement of past due debts and if so, have I the right as Chairman to issue warrants for payment of past due debts and should payments be made pro rata?

"Should all supplies purchased for the Road Department be made by requisition and purchase order?

"Am I liable on my bond for the issuance of irregular or illegal warrants where the claim is passed by the Commissioners Court. The Commissioners themselves are bonded.

Your first inquiry should be answered in the affirmative. By Local Acts of 1937, page 63, it is provided as follows:

"Each member of the Court of County Commissioners of Bibb County Alabama shall be paid **** out of the gasoline excise tax fund *** accruing to Bibb County, for their services in inspecting the

work of maintenance, up-keep, and repairing the public roads of Bibb County, or for their services in supervising such work on said roads. * * *".

It is my opinion that this Act empowers each member of the Court of County Commissioners to inspect and supervise the roads, not only in his district but in Bibb County as a whole. There is nothing in the law limiting their authority merely to supervision as distinguished from inspecting the roads in their respective districts. Nor do I find anything in the law limiting their authority or responsiblity merely to the roads in their respective districts but it is my opinion that the County Commissioners may be directed by the County Governing Body to supervise and inspect the roads not only in their respective districts but in the County as a whole.

In answer to your second inquiry, I wish to advise you that in my opinion all claims against the County must be paid in the order in which they are allowed by the Court of County Commissioners and registered in the book kept by the Commissioners for that purpose as provided by Section 224-225 of the Code of Alabama 1923; except that certain claims are made preferred claims by statute and these take precedence and priority. See Section 231, Code of Alabama 1923, as amended by General Acts 1931, page 235 and General Acts 1935, page 162 and page 990.

In reference to your third inquiry, please be advised that Schedule 156.9 of Article 13, General Acts of 1935, page 511, provides that one-third of the excise tax imposed on gasoline by schedule 156.1, less the cost of collecting and administering is to be divided and distributed equally among the sixty-seven counties of the State and "shall be expended exclusively in the construction, maintenance and repair of roads and bridges in such county." By section 6754 of the Code of Alabama 1923, the Court of County Commissioners possesses original and unlimited jurisdiction in relation to the establishment, maintenance and construction of roads and bridges within the County. **Edwards vs. Bibb County,** 193 Ala. 554. Further this office has held that the budget act is not applicable to the gasoline tax fund, Opinions of Attorney General, Quarterly Report, Vol. 5, page 32, 38 Vol. 9, page 22. I, therefore, advise you that in reference to the gasoline fund received by your county the Court of County Commissioners has unlimited jurisdiction as to the expending of this money and may separate and allot the fund within the county as the Court of County Commissioners may order so long as the fund is expended "exclusively in the construction, maintenance and repair of roads and bridges in such county."

In answer to your fourth inquiry, General Acts of 1936, page 28 provides as follows:

"Section 1. The Board of Revenue or Court of County Commissioners or other governing body of each and every county in Alabama is hereby authorized and empowered to expend an amount not to exceed one-third of the total amount that may be received by each county from the levy and collection of any tax on gasoline in the payment of any debt that may have been heretofore incurred by such county for the construction and/or maintenance of roads or bridges.

"Section 2. All expenditures heretofore made for the purposes and from the funds named in Section 1 of this Act are hereby ratified."

I previously advised you that all claims against the County must be paid in the order in which they were allowed by the Court of County Commissioners and registered. I, therefore, advise you that as Chairman, you

must under the law issue warrants from the above fund for the payment of past due debts in the order in which they were allowed by the Court of County Commissioners and registered in the book kept for that purpose and cannot be prorated.

In answer to your fifth inquiry, I can find no law which requires that supplies purchased for the road department be made by requisition and purchase order. It is my opinion pursuant to Section 6755 Code of Alabama 1923. Courts of County Commissioners may make such rules and regulations as they deem proper for the purchase of necessary supplies for the County.

Your sixth inquiry is answered in the affirmative. A Probate Judge where he acts as Chairman of a Commissioners Court must sign all warrants ordered to be drawn by the Court of County Commissioners. Section 321 of the Code of Alabama 1923 provides in part as follows:

> "Such officer signing such warrants shall be liable for the amount of any warrant drawn and paid by such depositories without the authority of law."

This section has been interpreted that notwithstanding the fact that, although all claims are audited and allowed by the Commissioners Court, yet if the payment has been made without authority of law, the Probate Judge or president of the Court of County Commissioners is liable on his bond for the amount of these warrants. See Biennial Report of Attorney General, Vol. 6, page 5. This principle has been recognized by the Supreme Court in the case of Rowe vs. Johnson, 214 Ala. 510.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Mrs. V. B. Smiley, Clerk,
Intermediate Civil Court of Birmingham,
Birmingham, Alabama.

Costs and fees—Constables of Municipal Court and Intermediate Civil Court of Birmingham held to collect the same fees as provided for sheriffs in Section 7287, Code of 1923 in civil cases involving $20.00 or more, under authority of General Acts 1911, page 548, and Section 7290 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter under date of March 21, 1938, requesting my opinion as follows:

> "We, the undersigned Clerks for the Municipal Court of Birmingham, Alabama, and the Intermediate Civil Court of Birmingham, Alabama, respectively request your opinion regarding the following situation:
>
> "The Constables of precincts 9, 37, 21, 46, 34, 10 and 42, Jefferson County, Alabama, who together with the Sheriff return process to said

Courts, have demanded of the Clerks of said Courts that they be paid the same fees in controversies over $20.00 as is being paid the Sheriff of Jefferson County.

"The Constables cite as their authority for such demand Section 7290, 1923 Code of Alabama.

"The Constables are now paid, in suits where the amounts involved are more than $20.00, according to the schedule set forth in Section 3722, 1907 Code of Alabama.

"The Sheriff of Jefferson County is now being paid according to schedule set forth in Section 7287, 1923 Code of Alabama.

"Please render us an opinion as to which schedule of fees, in controversies where the amount is over $20.00, the said Constables should be paid under."

In reply to your question, I wish to refer you to the General Acts of 1911, page 548, Act No. 464, which provides as follows:

"Section 1. That on and after the passage of this act the fees of constables in all the counties of this State shall be the same as the sheriff's fees when performing the same or like services; provided that in civil causes, in which the amount in controversy is less than twenty dollars ($20.00), the constables shall not receive for their services therein greater fees than are now allowed by law. This act shall apply to work done in civil cases, and shall not apply in criminal cases. The provisions of this act shall become effective on the expiration of the present terms of office of the officials affected thereby.

"Sec. 2. That all laws and parts of laws in conflict with this act be, and the same are hereby repealed."

In my judgment, the General Act of 1911, page 548 specifically repeals any and all laws or parts of laws contrary to the provisions set out therein. This act, in my judgment, set a schedule of costs and fees for constables to coincide with the fees paid to sheriffs for the same services in civil cases involving $20.00 or more under the provisions of Section 3722 of the Code of 1907.

Section 7290 of the Code of 1923 adopted the provisions of the 1911 General Act, supra.

Section 7290 provides in part as follows:

"In civil cases, the fees of constables shall be the same as the sheriff's fees when performing the same or like services, where the amount in controversy is twenty dollars or more."

It is my opinion that the constables named in your request should receive the same fees as paid to the sheriff in civil cases where the amount involved is $20.00 or more. Section 7287 of the Code of 1923 provides the fees for sheriffs, and it is my opinion that this section sets the same fees in civil cases for constables when the same services are rendered in civil cases involving $20.00 or more.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. E. J. St. John,
License Inspector,
Morgan County,
Decatur, Alabama.

Contractors—

Electrical engineers—Under facts stated, party held liable for license imposed by Schedule 58 of the General Revenue Act of 1935, upon electrical engineers rather than that imposed by Schedule 42 of said Act, upon construction companies or contractors.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 29, 1938, in which you request my opinion as follows:

"Information has reached me that the City of Decatur and the City of Hartselle will each, in a short time, let a contract for building an electric distribution system. My information is that the work of construction will be the setting of poles, stringing of wires outside of houses, setting of transformers and putting on of cross arms. All of the work will be outside of buildings and will result in the construction of an electrical distribution system in the cities involved.

"Please advise me whether the contractors who builds this system must take out state and county license as contractors."

As I understand the facts detailed in your inquiry the party who will contract with the City of Decatur and the city of Hartselle will be engaged in the setting up of an electrical distribution system entirely distinct and apart from any building. In other words, the work done will not be "on or in any building or structure."

In my opinion, such a party would not be liable for the license imposed upon contractors or construction companies by Schedule 42 of the General Revenue Laws of 1935, which provides, in pertinent part, as follows:

"Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, electric wiring or other steel, or any other building material, or shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, or who shall accept an order for or contract to excavate earth, rock or other material for foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material, or shall accept a contract to construct highways, bridges, dams, or railroads, shall be deemed a contractor. * * *"

You will notice from the foregoing schedule that the license is imposed upon parties accepting contracts for "doing work or in any building structure." Under the facts detailed by you, the party is not engaged in accepting any such contracts. The words "electrical wiring" which appear in Schedule 42, supra, refer to electrical wiring "on or in any building or structure" and not to the electrical wiring such as is contemplated will be done under the contracts mentioned by you.

It being shown therefore that this contractor would not come under the provisions of the first part of the schedule as the work to be done is not "on or in any building or structure" then the only provision of the section which could possibly impose a license tax against this contractor would be the words "or who shall accept an order for or contract to excavate earth, rock, or other material for foundations or any other purpose." In my opinion this portion of the schedule could not apply to the facts under consideration, since the **actual contract is for the erection of an electrical distribution system,** and although holes would have to be dug in order to erect poles, etc., **the digging of these holes would be only an incident to the work contracted for.** That is, if the company contracting to erect this electrical distribution system was to sub-contract with Mr. X to dig the necessary holes and to pay Mr. X for this work the sum of ten thousand dollars then in my opinion, Mr. X would be subject to pay the license called for by Schedule 42, but here it appears that the digging or excavating is merely an incident to the actual work involved.

It appears however, that the contractors would be liable for the licenses imposed by Schedule 58 of the Revenue Act of 1935 upon electrical engineers, it being my judgment that the work of construction of the electrical distribution system is such work as would be included within the contemplation of the words "electrical engineering."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Elba, Alabama.

Elections—Proposed constitutional amendment.

The expenses of election supplies in the election upon the proposed constitutional amendment provided for by Acts 1936-37, page 234, are not payable from county funds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Section 6, Act of or resolution of Legislature of February 26, 1937, (Extra Session Acts, pp. 235-6) reads as follows:

" 'The expenses of the election hereby ordered upon said proposed amendment and the costs of the publication of the notices shall be paid out of the State Treasury in the same manner as the expenses of other elections are paid.'

"This proposed amendment affects only one County, namely, Limestone County. The day set for the special election is May 3, 1938. Section 6 of the resolution provides for the expenses to be paid 'out of the State Treasury', and then goes on to say, 'in the same manner as the expenses of other elections are paid'. Does the County pay for the expenses?

"Sections 526 527, and 528 of Code (Article 19) relative to Constitutional Amendments, makes no provision for payment by County.

"The expenses of primary elections are paid by County, also general elections. This resolution does not provide payment by county, but by the State, that is, 'out of the State Treasury'. It cannot mean out of the County Treasury in the same manner as the expenses of other elections are paid.

"Is Coffee County charged with the expenses of the election supplies for this proposed amendment?"

In my opinion, Coffee County is not charged with the expenses of election supplies for the election upon the proposed constitutional amendment.

Section 6 of Acts Extra Session 1936-37, page 234, quoted in your inquiry, supra, evinces the specific legislative intention that the expenses of the election upon the constitutional question should be paid out of the State Treasury.

Except for such a specific provision for the payment of expenses, the same are paid by the county, as in other elections. Compare **Biennial Report of the Attorney General, 1930-32,** page 468; **Quarterly Report of the Attorney General, Vol. II,** p. 286.

The phrase, "In the same manner as the expenses of other elections are paid", does not, in my opinion, indicate the legislative intention that the expenses of this particular election should be paid from county funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. W. A. Jackson, President,
Board of Revenue, Barbour County,
Eufaula, Alabama.

County funds set aside in a sinking fund for the purpose of retiring bonded indebtedness on a certain specified date may be used by the County before that date, for the purpose of retiring a portion of the bonded indebtedness, where such use would result in a saving to the county.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of April 7, 1938, which is as follows:

"Like all counties—Barbour County, issued some '**Road and Bridge Bonds.**' These bonds all mature in 1941. **All in a lump sum.** Our Board of Revenue arranged, and provided a 'sinking fund' to anticipate the payment of these Road and Bridge Bonds, and set aside $2000.00 in 1937, and a like sum in this year.

"The bonds so issued are not yet due, and will not mature until 1941. Some of these bonds are being offered for sale at around $110. We have $4,000 cash on hand for the purpose of applying on the bonds when they become due.

"We would be glad if you would advise us if the Board of Revenue would be permitted—and in their legal rights, to redeem such of these bonds as our funds will permit at about par, or around the quoted price. Our funds, on hand are idle, and the County can save some money if we are permitted to redeem such bonds as we can."

I am of the opinion that the sinking fund set up by Barbour County to retire Road and Bridge Bonds of the county in 1941 can be used to retire those bonds, or a portion thereof, prior to the maturity date of the bonds when such premature retirement would result in a substantial saving to the county.

I am herewith enclosing a copy of an opinion rendered by this office on April 10, 1935, to the county solicitor of Limestone County, which deals with the question at hand.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. W. H. Coleman, Clerk,
Circuit Court,
Sumter County,
Livingston, Alabama.

There is no trial tax in forfeitures where such proceedings have been taken against the defendant in a criminal case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have a request for an opinion which was forwarded to this office by Hon. J. B. Aldridge, Circuit Solicitor, asking that we advise you as to the following matter:

"Where a forfeiture is taken against a defendant and the cost of the forfeiture is paid by the defendant, should there be a State trial tax collected as a part of the cost of the forfeiture?"

My answer to your request is in the negative. An opinion of this office written to Hon. J. H. Hard, Jr., State Comptroller, under date of October 16, 1931, Biennial Report of Attorney General, 1932-34, p. 390, held that a forfeiture is ancillary proceedings growing out of the original case. It is not an independent matter. It is purely in aid of the original suit. **Quarterly Report of Attorney General,** Vol. VII, p. 186.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Roy O. Hill,
Clerk Circuit Court,
Houston County,
Dothan, Alabama.

Where judgment is obtained and is collected in part or in whole, the costs of the case is the first item to be paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date, in which you state that sometime ago a party was tried in the Circuit Court of your county and convicted for the offense of bastardy. Failing to make bond as required by law, he was sentenced to serve a term of one year in the State Penitentiary. You state that he is now out; that at the time he was convicted, there was a judgment rendered against him for $500.00 for the support of the bastard child; that recently a garnishment has been run; and that certain parties were indebted to him and that $165.00 was collected on this garnishment on the judgment.

Your desire to know how this money should be distributed. Should the costs be paid out of this, that is, the costs of the original suit and the cost of the garnishment, or should all this money go to the support of the child ?

Whenever a party brings suit in any court in Alabama and calls into action the machinery of the court, if he is successful, he not only recovers judgment for himself but also recovers a judgment for costs. But, he also recovers this judgment ostensibly for himself, but actually for the officers of the court. At the common law cost was not recoverable. It is only by statute that we are now permitted to assess the same.

If the plaintiff recovers in his suit, he also recovers the costs and is bound to pay this cost to the officers to whom it goes. In the case of **Ranck v. Hill,** Executor, 3 Barr (Pa.) p. 423, it was held:

> "The fees of officers are part of the plaintiff's costs which he is supposed to have paid to them, and which he collects ostensibly for himself, but actually for them, by his execution: and such has been the practice from the foundation of the state as a province."

This case was digested by Mr. Mayfield with approval. Vol. VIII. p. 208. I am unable to find where our courts of last resort have passed on this question, and certainly up to the time of Mayfield's Digest they had not passed upon it, this is why Judge Mayfield goes outside to find a case bearing on this question.

In the above case it was held that the legal title to the cost was in the plaintiff, **but only as a trustee.** Trustee for whom? For the officers to whom the cost must go. Therefore, we are of the opinion that when the plaintiff recovers his judgment together with the cost of the suit and the levy is made under execution or the judgment is collected by the clerk or sheriff without execution, the cost of the litigation is the first item to be paid out of the proceeds of the judgment. This has always been the custom in Alabama and I doubt not if this matter was to go before the Supreme

Court this court would say that the custom so long in force in Alabama had become an unwritten law. This would be no vile presumption for certainly as far back as we are able to go, this principle has been recognized by the courts, by litigants and by the officers.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. J. P. Mitchell,
Judge of Probate,
Henry County,
Abbeville, Alabama

Licenses—

Person operating small peanut shelling machine for agricultural purposes is not subject to license provided by Section 348, Schedule 59, 1935 Revenue Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of April 6, 1938, in which you request my opinion as follows:

"Would a person operating a small peanut shelling machine, which is shelling peanuts solely for planting purposes and for which he charges toll in the form of peanuts be subject to license under Schedule 59 of the Revenue Code of 1935?"

I am of the opinion that the person mentioned in your request is not subject to the license provided under Schedule 59 of Section 348 of the Revenue Act 1935 (1935 Acts, at page 460). Schedule 59 relates to a peanut shelling "plant" and I do not think a "peanut shelling machine" is such a "plant", as the schedule contemplates.

The license is obviously intended to apply commercial situations, as the lowest license is for plants where the investment is less than $15,000.00. I do not think it was the intention of the legislature to include a small peanut shelling machine which is used solely for agricultural purposes.

Therefore, I am of the opinion that the person mentioned is not subject to license under Schedule 59.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. H. R. Ellis,
Member, Board of Revenue,
Lowndes County,
Fort Deposit, Alabama.

Lowndes County—Fee of Judge of Probate for discharging duties in relation to public roads (Section 7285, Code of Alabama, 1923) is not applicable to Lowndes County.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge receipt of your letter of April 4, 1938, which is as follows:

"Code of 1923, Section 7285, page 599, provides an annual fee for the Probate Judge, not to exceed $400.00 for 'Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties.' The next paragraph provides that no part of said fee shall apply to a Probate Judge whose net income annually, exceeds $5,000.00.

"In Lowndes County the Probate Judge is **not the chairman** of the Board of Revenue, and it is a question what duties the Probate Judge of Lowndes County can legally preform to entitle him to part or all of said fee.

"Assuming that the Probate Judge of Lowndes County has a net income of less than $5000.00, I would like your opinion on the following:

"1. Is any or all of the fee referred to above, a legal payment to the Probate Judge in Lowndes County?

"2. If your answer is in the affirmative then what duty can the Probate Judge of Lowndes County legally perform to entitle him to any and or all of said fee?

"3. Again, if your answer is in the affirmative, is it mandatory upon the Board of Revenue that part or all of said fee be paid the Probate Judge of Lowndes County?

"4. Should any or all of the above be mandatory, should the Probate Judge be itemized according to his physical and or official duties?"

I am of the opinion that your first inquiry should be answered in the negative. The Board of Revenue of Lowndes County was created by Act No. 264, Acts 1875-1876, p. 383, which provides, "There is hereby established a Board to consist of the Judge of the probate court and four other persons, to be called the Board of Revenue of Lowndes County." This Act was superseded by Act No. 111, Acts 1894-1895, p. 186, which makes no mention of the former Local Act. This latter Act provides, "From and after the passage of this Act, the Board of Revenue of the County of Lowndes, shall be so changed as to consist of five (5) members which shall be elected at the same time every two years, at which the governor and other state officers are elected, and **the probate judge is by this Act relieved from his official connection with such board.**" There is no later amendment reinstating the Judge of Probate as a member of the Board of Revenue.

From the above it is clear that no duties in relation to roads are imposed upon the Judge of Probate of Lowndes County. Therefore, it is my opinion that he is not entitled to the compensation provided by Section 7285, Code of 1923.

Acts Nos. 216 and 401, Local Acts 1927, pp. 123 and 331, purport to amend the first mentioned Act, but have no bearing on your inquiries. However, the provisions of the Act of 1895, "relieving the Judge of Probate from his official connection with such Board," has not been repealed.

Inasmuch as your first inquiry is answered in the negative, an answer to your inquiries Nos. 2, 3 and 4 is unnecessary.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Local 1907 - P. 57

Fees: Circuit Clerk of Montgomery County is entitled to commission on witness fees collected and paid into the General Fund of the County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of November 22, 1937, in which you state.

"Under a local act approved August 6, 1907 (Local Acts 1907, Page 629) the Fine & Forfeiture Fund of Montgomery County was abolished. Witness fees collected had been paid into and became a part of the Fine and Forfeiture Fund from which they were paid. This Act merged the Fine and Forfeiture Fund with the General Fund.

"Under a local Act approved August 2, 1907 (Local Acts 1907, Page 721) all grand jury witnesses and witnesses in State jailed criminal cases were paid from the General Fund. Sub-section 16 of Section 6724 of the Code of 1923 provides that the Clerk receive five per cent (5%) commission on 'What money they have received for the County'.

You request my opinion as follows:

"I desire to know if the Clerk is entitled to five per cent (5%) on witness fees paid to the General Fund?"

In my opinion your question should be answered in the affirmative.

The Montgomery County Fine and Forfeiture Fund was abolished and merged into the General Fund of the County by the passage of Act no. 507, S. 526, approved August 6, 1907, (Local Acts 907, p. 629) which provides in part as follows:

"Section 8. After all claims registered under the provisions of this act are paid in full, compromised or settled, **the fine and forfeiture fund**

of said county shall be abolished and merged into the general fund." (Italics supplied).

After the passage of Act No. 584, S. 527, approved August 2, 1907, (Local Act 1907, p. 721) witnesses before the grand juries and State witnesses in all criminal cases, were paid out of the General Fund of the county. Section 1 of this Act provides as follows:

"Section 1. Be it enacted by the legislature of Alabama, That after the passage of **this act witnesses before the grand juries and State witnesses in all criminal cases, and fees of the sheriff of the county of Montgomery**; the clerks of the city court of Montgomery and the county court in and for said county, in criminal cases where the State fails to convict, **shall be paid out of the general fund of said county as** hereinafter provided, * * *" (Italics supplied).

Subsection 16 of Section 6724 of the 1923 Code of Alabama, provides as follows:

"Section 6724, THEIR DUTIES.—It is the duty of the clerk of the circuit court—

* * * *

"16. To render to the county treasurer, court of county commissioners, or board of revenue, within thirty days after each term of the court, a statement in writing and under oath, of the fines assessed and forfeitures obtained during such term, the amount of each, and against whom each was assessed or obtained, and also what **money they have received for the county, specifying from whom, on what account and the amount in each case; and after deducting from such amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds."** (Italics supplied).

In Montgomery County the witness fees are not paid out of the Fine and Forfeiture Fund, but are now paid out of the General Fund of the County. The witness fees collected by the clerk are now paid into the General Fund of the county instead of the Fine and Forfeiture Fund. The witnesses are paid irrespective of the witness fees collected by the clerk. Although I admit that the witness fees collected by the clerk are paid into the General Fund of the county to reimburse the county for witness fees paid out of said fund, nevertheless, it is my opinion that the witness fees collected by the clerk are funds collected for the county, and not for the individual witness, so as to come within the purview of subsection 16 of Section 6724 of the 1923 Code of Alabama, supra, and, therefore, the clerk is entitled to his commission of 5 per cent on witness fees collected and paid into the General Fund of Montgomery County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. A. J. Morrow,
Tax Collector,
Coffee County,
Elba, Alabama.

Taxation—Exemption to insane person and homestead exemptions may be allowed on same property.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of May 18, 1938, which is as follows:

"As Tax Collector of Coffee County, Alabama, I wish to request your opinion in the case as follows:

"There is a World War Veteran in this County who has been adjudged to be insane by the court of competent jurisdiction. This incompetent owns real property in the County which is now assessed in the amount of $1800. This real estate consists of two tracts, one of which is his homestead.

"You will recall the recent law exempting homesteads from payment of the State's share of taxes thereon to the extent of $2000. The above mentioned veteran claimed homestead exemption under the law; and, in that connection this homestead was valued at $1160, and his exemption was computed as being an amount of $7.54.

"Also, you will recall that by an act of the legislature, General Acts of Alabama, Extra Session 1932, all persons who have been declared insane are exempt from ad valorem taxes upon their property to the extent of $2000.

"You will also recall that in a former Opinion of the Attorney General it was held that the $2000 exemption on account of insanity was to be considered in connection with the actual value of the property, and the exemption from tax value of the property should be 60 per cent thereof.

"It would be seen, therefore, that in the case above stated, if the veteran's exemption in the amount of $1200 by reason of his insanity be credited first, then, there would be property of a tax valuation of only $600 remaining; and, in such a case, it would be impossible to allow a homestead exemption on a valuation of $1160. On the other hand, if the homestead exemption is the first to be allowed, then, there would remain a valuation of only $640 with reference to which a veteran could claim his exemption by reason of insanity.

"The tax rate in Coffee County is $2.10 per hundred of which, as you know, 65c per hundred is state tax.

"Taking all the above facts into consideration, I ask answers to questions as follows:

"1. How should the two above mentioned tax exemption laws be applied to the property of this veteran?

"2. What amount, if any, of taxes would this veteran be liable to pay?"

This office has previously held that the exemption of $2000 ($1200 assessed value) to an insane person which is provided by Section 2(f) General Revenue Act of 1935, General Acts, 1935, p. 256, and the exemption of $2000 ($2000 assessed value) for homestead, which is provided by Act 107, General Acts 1936-37, p. 113, are cumulative. **Quarterly Reports of Attorney General,** Vol. VIII, p. 18; **Quarterly Reports of Attorney General,** Vol. IX, p. 168.

In the instant case, I suggest that the $1200 exemption to an insane person from all taxes be credited first against the $1800 assessed value of the property, for there remains then a balance of $600 which can be claimed as a homestead. A homestead is exempt only from state taxes. You state that the tax rate in Coffee County is $2.10, of which amount 65c is the state tax. This leaves a tax rate of $1.45 chargeable against a $600 assessment. Therefore, I am of the opinion that the tax on the property in question is $8.70.

Of course, the homestead exemption could be allowed first, but that procedure would not work out as beneficially to the taxpayer as the procedure outlined above.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Fred H. Price,
Clerk of the Circuit Court,
Autauga County,
Prattville, Alabama.

Where a defendant is convicted and sentenced to the penitentiary in two separate and distinct cases, there should be two separate and distinct cost bills showing the costs in each case, and when the convict is turned over to the penitentiary authorities the costs in each case should be paid by that department.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 25, 1938, in which you request my opinion as follows:

"By way of illustration, defendant H was held in jail under warrant and affidavit and was indicted for Murder and Assault With Intent To Murder at the January 1938 session of the Grand Jury and no capiases were issued and was later sentenced in each case.

"Q. Would the Clerk be entitled to fees for Docketing Cause, Attending Trial, Entering Judgments, Making Final Record, Making Transcript to Penitentiary in each case, or the second case as well as the first case?

"Q. Would Section 3278, Code of Alabama, 1923 govern fees of the Sheriff in the second case?

* * * * * * * *

"Defendant C was indicted at the July Term, 1935, of the Grand Jury for Manufacturing Liquor and Possessing a Still, and a Writ of Arrest was issued immediately. The defendant was never apprehended and was subsequently indicted at the July Term, 1937, of the Grand Jury for Murder. A Writ of Arrest was issued in this case also. Approximately four months after the Murder indictment was returned the defendant was arrested for a misdemeanor in another State and held for Autauga County authorities. The sheriff of Autauga County immediately went to the place where the defendant was held and the defendant was placed under arrest by him under both capiases and both cases later docketed. Upon trial, the defendant plead guilty in both cases and was sentenced to the penitentiary. Whereas, the following questions arise:

"1. Shall the Convict Department pay for the issuing of a capias in each case?

"2. Shall the Convict Department pay for the arrest fees in each case?

"3. Should each case be treated separately and apart from the other in regards to costs and fees?"

My answer to your first request is in the affirmative. It is my opinion you are entitled to the cost enumerated above. Of course, you would not be entitled to costs for issuing capiases if you did not issue any, and you say you did not. What I am saying would include both cases, as each case, as stated by you, is a separate and independent charge, one murder and the other assault with intent to murder. I call your attention to Section 3670, Code of Alabama, 1923, which is as follows:

"Section 3670. CLERK MUST SWEAR TO BILL OF COSTS AND FORWARD TO PRESIDENT OF THE BOARD; LIMIT; HOW PAID.—After such conviction, the clerk of the court in which the conviction is had, shall make out a bill of the costs in the case, containing no items not enumerated in the preceding sections; he shall make oath to the correctness of each item of said bill, and that the same is a legal charge against the defendant; he shall forward the bill of costs to the president of the board or the officer discharging his duties, who shall carefully examine the same, and if found correct, he shall request the state auditor in writing to draw his warrant upon the state treasurer for the payment of said bill to said clerk out of the convict fund. No costs shall be paid, until the convict has been delivered to the penitentiary officials, **and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall be paid when he is delivered to such officials.**"

In this particular case, I do not think that Section 3278, Code of Alabama, 1923, would apply, as I gather from what you say the defendant was not held on a capias but was held by virture of the indictment being at the time already in jail.

Answering your second request, which you number 1, 2, and 3, my answer is in the affirmative. As stated concerning your first request, each case stated by you is a separate and distinct prosecution and should be paid on conviction and delivery of the convict to the officials of the Convict Department as provided by Section 3670, supra. I might say here that this section is different from the corresponding section in the Code of 1907 as shown by Section 6575. Here the costs were not paid in the second case

until the convict had finished his term in the first case, but, as can be seen by reading Section 3670, supra, all the costs in each case must be paid on the delivery of the convict to the penitentiary authorities.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. E. C. Torbert,
Register, Circuit Court,
Hale County,
Greensboro, Alabama.

Where all the cost of the Supreme Court includes only the making of the transcript and transmitting it to the Supreme Court, and such cost being collected, it should not be prorated among the other officials, as the register who prepared the transcript is the only one entitled to same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 27, 1938, in which you request my opinion as follows:

"Please advise me as to how the money collected in the following case should be handled.

"I have a case appealed from the Equity Court to the Supreme Court which was sent back for a new trial, the cost in the appeal was $109.64, which amount has been paid; the other court costs have not been paid. Should the amount collected be paid to the ex-Register or should it be prorated to all the costs."

I also have your letter of May 16, 1938, in reply to my letter asking for further information, which is as follows:

"I am enclosing a cost bill in the case which I asked for an opinion on as to the distribution of the costs which have been paid?

"As you will see only the costs of the appeal have been paid so far. There has been nothing done about this case since the ruling of the Supreme Court; the parties are about to agree upon a settlement, and if they do then may be that I can collect the balance of the costs."

I gather from the bill of costs which you enclosed that the money which has been paid to date was paid to cover the costs incurred in perfecting the appeal to the Supreme Court. This being true, all of this cost goes to him as he was the one who did the work. In preparing the transcript for the Supreme Court, no one else has any interest in the same, therefore, this cost could not and should not be prorated as no one else has any interest or claim in same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. Matt A. Boykin,
Judge of Pobate,
Mobile County,
Mobile, Alabama.

Probate Judge—

Not entitled to any fee or commission for handling money paid into Probate Court, pursuant to order for condemnation of lands, by the person condemning the same, for owners of said lands.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter as follows:

"On October 26, 1937, a petition was filed in this Court styled Alabama Power Company vs. Bessie Rivers et al for comdemnation of lands. Appraisers were appointed, their report made, order of comdemnation was entered.

"On January 4, 1938, the Alabama Power Company paid into this Court one large check to cover court costs and the rest to be distributed to six different owners.

"Before paying this money to the owners, I would like to get your opinion as to whether the court is entitled to a 1½ per cent commission or fee for handling this money, if so, who is to pay this commission or fee, the Power Company, or the land owner."

The only provision which I find for the payment of a commision or fee of 1½ per cent to the Probate Judge for receiving and paying out moneys is the provision contained in Section 8254 of the Code of Alabama, 1923. This section reads as follows:

"The judge of probate shall keep a well bound book in which he shall enter a separate account with each person for whose use he shall receive and pay out such money, which book shall be open to inspection, and as each payment is made the judge of probate shall take a receipt therefor which shall be preserved by him. For receiving and paying out such money, he shall be entitled to a commission of one and one-half per cent. Upon his retirement from office, he shall pay over to his successor any such fund left in his hands."

You will note that this section is a part of Article 11 of Chapter 299 which is styled: "JUDGE OF PROBATE CUSTODIAN OF FUNDS OF MINOR OR PERSON OF UNSOUND MIND, NOT EXCEEDING TWO HUNDRED DOLLARS; DISBURSEMENT OF SAME." This Article consists of Sections 8250-8254. It seems that Section 8254, supra, is new to the Code of 1923 and that the same was written by the Code Commission. The Code Commission evidently thought it advisable to have the records on this subject preserved carefully and also thought that the Probate Judge should be entitled to a fee for his services in receiving and paying out this money. However, this section, allowing this fee or commission of 1½ per cent refers to "such money". I think that there is no doubt that this means the money or minors or persons of unsound mind, not exceeding $200.00, dealt with in this article. Therefore, you would not be entitled to a

fee or commission of 1½ per cent on the monies described in your letter of inquiry by virtue of the provisions of said Section 8254.

A careful examination of the statutes covering fees, commissions, allowances, etc. to Judges of Probate fails to disclose any statutory provision allowing a Judge of Probate a fee or commission of 1½ per cent of the monies described. Further, this examination fails to disclose any statutory provision allowing any fee or commission whatever to the Judge of Probate in such a case.

Section 7255 of the Code of Alabama, 1923, provides as follows:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

Under this well known rule of statutory construction, an office claiming a fee or commission must point to specific statutory authority for the same.

The premises considered, it is my opinion that you are not entitled to any fee or commission for handling the monies described in your letter of inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 14, 1938

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Licenses and Taxation—

Motor Vehicles—Non-resident owner—

(1). Under and by virture of an agreement of reciprocity entered into by the taxing authorities of the states of Alabama and Georgia, which such agreement is authorized by Schedule 158.15 of the Revenue Acts of 1935, as amended by Acts Extra Session, 1936, page 208, the owner and operator of a motor truck used solely for the transportation of his own goods, wares, and merchandise, who has complied with all the motor vehicle registration laws of Georgia, may operate said motor vehicle in Alabama without first procuring Alabama motor vehicle license plates.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"A person owns and operates a bottling plant in the City of Opelika, and has paid all licenses due by him as a bottler and has also provided the proper license tags for all trucks owned and operated by him in the delivery of his products within the State of Alabama.

"He maintains a warehouse in LaGrange, Georgia, to which said warehouse products bottled in Opelika are delivered and stored for sale within the State of Georgia.

"The person owning said plant in Alabama owns a delivery truck, which remains in Georgia, for the delivery of products from the warehouse within the State of Georgia. This truck has been provided with the proper license plates and has met all the requirements of the laws of Georgia.

"The owner desires to have this truck come to Opelika once or twice a week to procure bottled products from the Alabama plant and to carry them back to Georgia for storage in said warehouse, for sale and delivery therefrom.

"Since this man has complied with the laws of Georgia, and since said truck is not situated within the State of Alabama, would he be required to purchase an Alabama license plate in order to come into this state to transport products, bottled in Opelika, back to his warehouse in Georgia?"

In my opinion, your inquiry must be answered in the negative. Schedule 158.15 of Section 348 of the Revenue Act of 1935, as amended by Acts Extra Session, 1936, page 208, provides in part as follows:

"The State Tax Commission of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that will be considered as a fair exchange of rights and privileges. The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other.

"The above reciprocal agreement can be annulled on a notice issued to either party by the other party thereto within thirty (30) days thereafter."

Pursuant to such authority, the State Tax Commission of Alabama and the State Revenue Commission of Georgia entered into an agreement of reciprocity, under date of September 26, 1936. Paragraphs 2 and 5 thereof provide:

"Paragraph 2. That any truck or combination of truck and semi-trailer operated by the owner, or duly authorized agent thereof, for the purpose of transporting goods, wares or merchandise, the actual property of the owner of said vehicle, shall be allowed to operate in the State of Georgia without a Georgia license or registration for the actual period covered by the license issued by the State of Alabama. However the provision does not permit residents of either State to go into the other State and buy up agricultural or farm products, or other goods and peddle or offer the same for sale in the other State without registering such vehicle and obtaining a license tag therefor in such State.

"Paragraph 5. Likewise, motor vehicles duly licensed and properly registered by the State of Georgia shall enjoy the rights and privileges exactly similar and corresponding to those described hereinabove when operating in the State of Alabama."

I am advised by the State Tax Commission of Alabama that the agreement of reciprocity is still in full force and effect.

The operator of the motor vehicle described in your letter of inquiry comes squarely within the provisions of the agreement of reciprocity; and he is, therefore, not required to obtain Alabama license plates in order to continue such operation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1938

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Counties—Special road and bridge fund provided for in Section 215 of the Constitution of 1901 cannot be used for the erection of school building.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date, which is as follows:

"The Court of County Revenue of Franklin County has agreed to appropriate $5000.00 to supplement the building fund of the Red Bay Public School, for the purpose of adding a vocational building in order that said school can qualify as a vocational High School and benefit by the federal appropriation under what is known as the Smith-Hughes Act of Congress. The title to said school grounds is in the State of Alabama.

"Is such a school building a 'necessary public building' within the purview of Section 215 of the Constitution so that the county may pay said appropriation from the tax levied under said Section of the Constitution, constituting what is known as the county's road and bridge fund?"

I am of the opinion that your inquiry should be answered in the negative. Section 215 of the Constitution of 1901, provides as follows:

"Section 215. No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

In connection with Section 215, supra, the Legislature provided for the execution of said section with reference to county property and buildings by virture of Article V of Chapter 16 (Sections 207-223 of the Code of 1923). With specific reference to the erection of public buildings, I wish to call your attention to Sections 212-219. Said sections deal with the erection of courthouses, jails, hospitals and other county buildings. **Quarterly Report of Attorney General,** Vol. VII, page 137. Applying the doctrine of ejusdem generis, it is apparent that school buildings were not contemplated by the Legislature in the enactment of these sections.—**Eliasberg Bros. Mercantile Co. v. Grimes,** 204 Ala. 492, 86 So. 56.

Section 215 of the Constitution, in my judgment, includes only those buildings specifically mentioned in Sections 212-219, supra, and those of a like nature. In other words, in my judgment, it applies to only those buildings which are used for the county purposes provided for in these sections and not to those buildings used for school purposes. The Legislature has amply provided for the erection of school buildings in separate legislative enactments. This shows the legislative intent that the erection of county buildings and school buildings should be treated separately.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Jefferson County—Members of County Commission of Jefferson County are not entitled to reimbursement for mileage traveled in the supervision and inspection of the county roads and bridges—General Acts 1935, page 982.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The Court of County Commissioners of Jefferson County has recently passed a resolution allowing the members of said Court mileage in their supervision of County Roads and Bridges."

You request my opinion as follows:

"(1) Please advise me if the members of the Court of County Commissioners of Jefferson County have authority to receive mileage for supervision of County Roads and Bridges.

"(2) If they have authority to receive mileage for supervision of Roads and Bridges can same be paid out of the gasoline tax?

"I wish to call your attention to Act approved September 22, 1915, page 573, Acts of 1915, and to Sections 4 and 6 of an Act approved June 16, 1931, pages 299 and 300 and Act approved March 4, 1937, page 179, Acts of 1936-37, also to the opinion of the Attorney General rendered to

Mr. Frank O. Deese, Probate Judge of Dale County on September 24, 1937."

In my opinion your first question should be answered in the negative. The form of the county governing body of Jefferson County was changed, and the compensation of the members thereof was fixed by General Acts 1931, page 298. A county commission was created in lieu of the then existing governing body, which was vested with all authority, jurisdiction and power which theretofore was, or which might thereafter be vested in courts of county commissioners or boards of revenue generally. By section 4 thereof it was provided:

"Section 4. That the compensation of each of said commissioners shall be the sum of $6,000.00 per annum, payable in equal monthly installments out of the general fund of the county."

No provision is made in said act for reimbursement for mileage in the inspection and supervision of the county roads and bridges. By General Acts 1915, page 573, which has been brought forward as Section 157 of the Highway Code of 1927, Acts 1927, page 391, and which appears as section 1397 (110) of Michie's Code of 1928, county governing bodies were vested with general superintendence of public roads and bridges, and were constituted courts of unlimited jurisdiction in the exercise of those powers. However, the power so granted is not broad enough to warrant members of county governing bodies in paying to themselves a fee or compensation which is not provided for by law.

The Act of 1936-37, cited in your inquiry, is not operative upon the question posed by you.

Your inquiry is answered by a consideration of two cardinal rules of law. The one is, that before an officer may take fees or compensation for services rendered by him in the performance of the duties of his office, he must point to some clear and definite provision of the statute which authorizes the demand, and the compensation cannot be allowed unless it is conferred by a strict construction of the language employed in the statute. **Mobile County v. Williams,** 180 Ala. 639, 647, and cases there cited.

The other is, that when a specific subject has been especially provided for by law it will not be considered as repealed by a subsequent law which deals with the general subject in a general way although the specific subject and the specific provision may be included in the general subject and the general provision. **City of Birmingham v. Southern Express Company,** 134 Ala. 529, 538, and cases there cited.

Applying these rules to the several statutes mentioned in your inquiry, these conclusions are inescapable:

(1) That inasmuch as the act creating the Jefferson County Commission (General Acts 1931, page 298) and providing for compensation of the members, omitted any provisions for mileage fees for inspecting and supervising the county roads and bridges, the members of said commission are not entitled to any such fees while performing such official functions.

(2) That inasmuch as the act, supra, providing the compensation of the members of the Jefferson County Commission was a special act providing for a specific subject, later enactments of the Legislature, for example, Code of 1923, Section 6771 and Acts 1936-37, page 179, which deal with the general subject of the compensation of members of county governing bodies and allowance of mileage for inspection and supervision of roads, do not have

the effect of modifying or repealing the Jefferson County Commission Act, although the general subjects dealt with in the latter acts include the special subject dealt with in the Jefferson County Commission Act.

The answer to your first inquiry obviates the necessity of consideration of the second inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 24, 1938

Hon. William Varner,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

A person taking out a license under Subsection (b) of Schedule 104 of Section 348, Alabama Revenue Act 1935, must procure both State and county license in every county in which he offers to do business.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 17, 1938, in which you request my opinion as follows:

"Section 104, (b) of License schedule, peddlers of drugs, state forty dollars shall be paid to the State and forty dollars to each county in which they do business.

"A person has procured license in another county, paying the above amount. He desires to do business in this County and wants to take out the proper license, is he due the State license and the County or only the county license."

It is my opinion that a party who takes out a state and county license to do business under Schedule 104, Subsection (b) of Section 348, Alabama Revenue Act of 1935, must secure such license in every county in which he does business. This is based on an opinion of this office written to Hon. N. P. Tompkins, Judge of Probate, Colbert County, under date of October 25, 1935, Quarterly Report of the Attorney General, Vol. I, page 117. That part of Schedule 104 of Section 348, Alabama Revenue Act of 1935, referred to above, is as follows:

"(b) Each itinerant vendor or peddler of spices, flavoring extracts, toilet articles, soaps, insecticides, stock and poultry supplies; proprietary medicines and household remedies in original packages and other packaged articles of like kind commonly used on the farm and in the home, who use a motor vehicle solely for the purpose of transporting merchandise from house to house or place to place who do not use such vehicle for the display of merchandise or as a rolling store and who do not

permit purchasers or prospective purchasers to enter said vehicle for the purpose of inspecting or purchasing merchandise shall pay an annual license of Forty Dollars to the State and Forty Dollars to each county in which they do business, * *."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 24, 1938

Hon. Gordon Persons, Chairman,
Rural Electrification Authority,
First National Bank Building,
Montgomery, Alabama.

Taxation—Corporations organized under the provisions of Act No. 45, H. 133, approved February 7, 1935, (General Acts 1935, p. 100), as amended by Act No. 168, H. 469, approved July 8, 1935, (General Acts 1935, p. 229) are not exempt from the provisions of the State Income Tax Law. However, if said corporations have no net income there would be no tax due.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 13, 1938, which is as follows:

"We have been requested to obtain an opinion from your office as to whether or not electric membership corporations, organized under the provisions of Act No. 45, H. 133, approved February 7, 1935 (General Acts 1935, page 100), as amended by Act No. 168, H. 469, approved July 8, 1935 (General Acts 1935, page 229), are exempt from the provisions of the income tax act of the State of Alabama."

I am of the opinion that your inquiry should be answered in the negative. However, if said corporations have no net income there would be no tax due.

Corporations organized under the provisions of Act No. 45, H. 133, approved February 7, 1935, (General Acts 1935, p. 100, as amended by Act No. 168, H. 469, approved July 8, 1935, (General Acts 1935, p. 229) are not instrumentalities of the State of Alabama or the Federal Government, and are not exempt from State taxation. Such a corporation has all the attributes of a private corporation, although it is not organized for the purpose of profit.—**Quarterly Report of Attorney General,** Vol. 7, p. 38; **Quarterly Report of Attorney General, Vol. 6, p. 76.** Such corporations are not, in my opinion, within the category of those listed as exempt from income tax under the provisions of Section 345.25 of the Revenue Act of 1935.

The premises considered, it is therefore my opinion that such corporations are not exempt from the provisions of the income tax laws of Alabama (Section 345 of the Revenue Act of 1935). However, if said corporations have no net income, there would be no income tax due.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 24, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Taxation—Tax Assessor—

1. When it is determined that a homestead exemption accorded a taxpayer was granted through the fraud or negligence of the tax assessor after the tax had been paid and the tax year closed and no fraud can be shown on the part of the taxpayer, no recourse can be had by the state against the taxpayer but the tax assessor is liable on his bond to the state for the amount of the error.

2. Where the error is found before the close of the tax year, the State Tax Commission, even though the tax has been paid, has the right to reassess the property and direct the tax collector of the county to collect the same as in the ordinary case.

3. Where the tax collector cannot collect the same, he has the authority to list the unpaid tax as delinquent to the Probate Judge.

4. Upon receipt of this delinquent tax, the Probate Judge has the authority to issue a decree of sale for this unpaid tax as in other delinquent cases.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you request my opinion on the following:

"When it is determined that the exemption accorded a taxpayer on a homestead exemption certificate has been wrongfully allowed after the payment of the tax on which the exemption applied.

"(1) Hasn't the tax assessor authority to notify the tax collector that the exemption was wrongful and should be collected by filing a supplemental abstract for the part of a tax that was exempted?

"(2) After the tax collector has been notified by the assessor that the exemption was wrongful and should be collected, hasn't the tax collector authority to list the unpaid part of taxes or the part that was wrongful exempted as a delinquent to the Probate Judge?

"(3) Upon receipt of the list of delinquent taxes, hasn't the Probate Judge authority to issue a decree of sale for this unpaid tax or the part that was wrongful exempted, just as he does in other delinquent cases?

"(4) Where it is determined that the tax assessor made an error in the exemption accorded a taxpayer on a homestead exemption certificate, isn't the tax assessor liable on his bond to the State for the amount of said error."

In considering your questions, I will assume first that the tax year has been closed. That is, that the error in granting the exemption was not discovered until after October 1st of the following tax year. It is my opinion that in this case, nothing can be done to correct the error as against the taxpayer or to collect the same from him unless fraud, either actual or constructive, can be shown on the part of the taxpayer. The Supreme Court

has held in the case of **Anniston City Land Company vs. State,** 185 Ala. 482, at p. 489:

> "We are at the conclusion, therefore, that this proceeding is in effect an effort on the part of the state, not to reach property that has escaped taxation, but to revise assessments once made, and upon which taxes have been collected. The defect in these assessments might have been remedied by the assessor or the commissioners' court during the then current years. It is now too late either to change the valuation or to annul an exemption then claimed and allowed."

Further, in the case of **State vs. Doster-Northington Drug Co.,** 196 Ala. 447, at p. 452, it was held:

> "If Section 2223 can be construed to confer authority on the State Tax Commission, at any time after the expiration of the tax year, to set aside and hold for naught any valuation of assessment of property made by the owner or any of the officers authorized by law to make assessments, it might become the source of great vexation, and of even oppression, to the taxpayer, and render uncertain property rights, and subject the taxpayer and his property to unreasonable and uncertain claims and tax liens.
>
> "A proper construction, therefore, of Section 2223, in connection with Section 2260 and with the general taxing system of the state, would require that this power 'to set aside and hold for naught' tax valuations and assessments be exercised by the State Tax Commission before the end of the current tax year."

The above principles have been reaffirmed in the following cases: **State vs. Mortgage Bond Co. of N. Y.,** 224 Ala. 406; **Tennessee Coal, Iron & Railroad Co. vs. Board of Education of Jefferson County,** 80 Fed. (2) 310.

The only time a review of an assessment such as the one we are considering here can be made by the state after the close of the tax year, is when the same is tainted with fraud, either actual or constructive, on the part of the taxpayer or for want of jurisdiction on the part of the taxing authorities. **Anniston City Land Co. vs. State,** supra; **Norwood vs. Anderson-Tully Co.,** 53 S. W. (2) 17.

In the absence of such fraud, this cannot be treated as an escape, as the fact remains that the entire piece of land was assessed either for taxation or as exempt, and upon such assessment the state has collected its taxes. The validity of the assessment as affecting this collection cannot now be reached by an escape assessment. **Anniston City Land Co. vs. State,** supra.

Where the tax year has not closed, that is, if the error in allowing the exemption is discovered before October 1st of the next tax year, even though the tax has been paid, it is my opinion that the state has the right to review assessments in the manner provided by the statutes. **State vs. Jefferson County Bank,** 200 Ala. 287.

The statutory provision to set aside, review and correct an assessment or exemption on the part of the state is contained in Article IV, Section 93 of the Revenue Laws of 1935 (General Acts, 1935, at p. 299), and that power is granted to the State Tax Commission as follows:

> "Section 93. It shall be the duty of the State Tax Commission, and it shall have the power and authority, in addition to the authority now in it vested by law. * * *

"(b) To equalize, value and assess or cause to be equalized, valued and assessed, any property subject to taxation, and such valuations and assessments it shall enter or cause to be entered in the proper assessment books, or record, or minutes of the proper official, board or tribunal; to set aside all assessments so entered in any assessment book, record or minutes within any time before the end of the assessment year, and after ten days' notice given the taxpayer which notice shall be given by registered mail return receipt demanded, of the time and place of hearing, revalue and reassess said property and cause such revaluation and assessment to be entered in the proper assessment book record or minutes in lieu of the original valuation and assessment, provided, that no reassessment or revaluation shall be made of any particular assessment from which an appeal is then pending, or if the valuation of the property for that year has been fixed on appeal by the Circuit Court or Supreme Court; provided further that parties may appeal from such revaluation and reassessment to the circuit court within like time and in like manner as from the valuation and assessment as fixed by the Board of Review."

Therefore, with the limitations hereinabove noted, your first question must be answered in the negative.

When this has been done by the State Tax Commission and no appeal is taken by the taxpayer, the State Tax Commission should direct the tax collector of the county to proceed to collect this tax as in the ordinary case.

In answer to your second inquiry, after the tax collector has been notified by the State Tax Commission to collect the tax, it is his duty to proceed pursuant to Article VI of the Revenue Laws of 1935, at p. 334. And if he is unable to collect the taxes, then he has the right to list them as delinquent to the Probate Judge.

Your third inquiry should be answered in the affirmative.

In reply to your fourth inquiry, when the error is discovered before the end of a tax year, the tax can be collected as outlined above or the property on which the same is a lien can be sold for taxes. If the error is discovered after the close of the tax year and the exemption was granted through the fraud or negligence of the tax assessor, and no fraud can be shown on the part of the taxpayer, it is my opinion that the tax assessor would be liable on his bond to the State for the amount of the error; as it is the duty of the tax assessor to inspect and examine real property in his county and this duty is directory. (Article III, Section 79, Revenue Laws of 1935, p. 296). It is primarly the duty of the tax assessor to grant and allow exemptions claimed by the taxpayer and where he grants an exemption through his negligence or fraud, and it is impossible to proceed against the taxpayer or the property, it then falls upon the tax assessor to make up this loss.

The opinion of this office addressed to you under date of January 7, 1938, wherein the same conflicts with the present opinion, is overruled and withdrawn.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 24, 1938

Hon. Wm. D. Peeler, Register,
Circuit Court in Equity,
Lauderdale County,
Florence, Alabama.

Register—Fees—

1. Register entitled to fee for preparing transcript of record for appeal to the Supreme Court of fifteen cents for each 100 words of transcript which includes the cost of furnishing a copy to the appellee.

2. Register of the Circuit Court is required to keep an office copy of a transcript on appeal to the Supreme Court for which he is authorized to charge five cents for each 100 words.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Please give to me the fees that I as Register would be allowed to charge for the original transcript to the Supreme Court, under Section 7283, of the Code of Alabama 1923, which provides, 'records for the Supreme Court for each one hundred words when not otherwise provided for herein fifteen cents,' which seems to be in conflict with Section 6102, of the Code of Alabama 1923, which provides ten cents for the original transcript to the Supreme Court or Court of Appeals.

"In other words, which of these two section prevails, Section 6102 or Section 7283. Also, in your opinion please state whether the five cents per hundred words as provided for in Section 7283 of the Code of 1923, is a correct charge for the Appellee's copy and the office copy."

It is my opinion that Section 6102 of the Code of Alabama, 1923, applies to this situation. Under the Code of 1907 there was no duty upon the register to supply the appellee with a copy of a transcript in a case appealed to the Supreme Court and the present Section 7283 of the Code of Alabama, 1923, was then the effective law. Subsequently by laws of 1919, page 884, Section 2, the present Section 6102 was enacted which placed upon the register the duty of making a copy of the transcript for the appellee. Under the ruling of **Middleton vs. General Water Works, and Electric Coporation**, 25 Ala. App. 455, Cert. Den. 227 Ala. 219, it is my judgment that Section 6102 controls, but the same amount of fees are charged under Section 6102 as would be charged under Section 7283. Since with the duty upon the register to supply a copy of the transcript to the appellee, the cost of the transcript is fifteen cents per one hundred words, that is, ten cents for each one hundred words for the original and five cents for each one hundred words for the copy to the appellee.

So that in accepting the view that the later pronouncement by the legislature in Section 6102 controls the situation yet this in effect does not repeal Section 7283 but both may stand together. To the same effect see also Quarterly Report of the Attorney General, Vol. 8. page 322.

Further in the Code of 1907, there was no duty upon the clerk of any court from which an appeal would lie to the Supreme Court or Court of

Appeals, to keep a copy of the transcript on file, but by laws of 1915, page 336, the present Section 6108 of the Code was enacted. This section specifically states that the clerk of all courts from which an appeal lies to the Supreme Court or Court of Appeals, shall be required to keep on file at their office an exact copy of the record.

It is my opinion that this section applies to the Register in Equity as it is my opinion that in all courts from which an appeal lies to the Supreme Court or Court of Appeals an exact copy of the record must be made by the Clerk of the court and kept in the file in his office. The Register in Equity has many powers and is charged with many duties not vested in nor imposed upon ordinary clerks, but it is fundamental that a Register in Equity is the Clerk of that court and the Supreme Court has held that a necessary implication is as efficacious an an expressed command, **Swindle vs. Crocker,** 217 Ala. 199.

As to the amount to be charged by the Register for making and keeping an office copy it is my opinion that Section 6108 of the Code and Section 7283 are in conflict as to the amount to be charged for making and keeping the office copy and following the reasoning contained in the case of **Middleton vs. General Water Works and Electric Corporation,** supra, Section 7283 controls and that the proper cast for the office copy would be five cents for each one hundred words. Further see Quarterly Report of Attorney General, Vol. 5, page 130.

The opinions of this office found in Vol. IX, at pages 30 and 91, in so far as the same are in conflict herewith are expressly overruled and withdrawn.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 24, 1938

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Taxation—Act No. 81, H. 259, approved February 3, 1937, (General Acts 1936-1937, p. 91), relative to redemption of land, sold for taxes and bid in by the State prior to January 1, 1935, applies only where State has not parted with its title.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of February 24, 1938, which is as follows:

"By act approved September 14, 1935, (1935 Acts, p. 1112) it is provided that a mortgagee having a mortgage duly recorded at the time of tax sale shall have the right to redeem from such tax sale at any time within one year from the date of written notice, by registered mail, to the mortgagee.

"Act approved February 5, 1937, (1936-37 Acts, p. 91) provides that when any real estate has, prior to January 1, 1935, been sold for taxes and bid in by the state, all persons having a right to redeem may do so by paying in four equal installments without any interest or penalties, if application to make such redemption is made before January 1, 1938.

"Under these and any other pertinent statutory provisions, will you please advise this office whether a mortgagee who has not been given the said notice by registered mail and having a mortgage of record at the time of tax sale to the state for 1932 taxes held on November 20, 1933, has the right to redeem from such tax sale without any interest or penalties under said Act approved February 3, 1937, the said mortgagee having made application for such redemption before January 1, 1938: NOTWITHSTANDING THE FACT the State Land Commission sold and conveyed the said real estate to a third party (a stranger to the title) on September 24, 1937."

I am of the opinion that your inquiry should be answered in the negative.

Acts No. 81, H. 259, approved February 31, 1937, (General Acts 1936-1937, p. 91), applies only when the State has not parted with its title. Said Act provides as follows:

"Section 1. Whenever any real estate has prior to January 1, 1935, been sold for taxes and bid in by the State at tax sale, the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions shall apply: All persons having the right to redeem, such redemption shall be made as in other cases, except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties. Any person having the right to redeem any property sold to the State for taxes, and who desires to redeem under the provisions hereof, shall, before January 1, 1938, make application to the State Land Commissioner and to the Probate Judge of the County where the real estate is situated, and shall deposit with the Probate Judge one-fourth of the amount of accrued taxes without interest and penalties and annually thereafter, shall pay one-fourth of said sum to the Probate Judge until the whole amount required has been paid, and thereupon certificate of redemption shall be issued as in other cases.

"Section 2. All laws and parts of laws in conflict with the provisions of this Act are hereby expressly repealed.

"Section 3. This Act shall go into effect immediately upon its passage and approval by the Governor.

"Approved February 3, 1937."

In construing said Act, and former legislation dealing with similar methods of redemption as said Act, the opinions of this office are predicated on the theory that title has not passed out of the State.—**Quarterly Report of Attorney General Vol. VII, p. 262; Quarterly Report of Attorney General, Vol. IV, p. 151.** The first opinion cited outlines the legislative history of the Acts under consideration.

Our Supreme Court in the case of **Union Central Life Insurance Company v. State,** 226 Ala. 420, 147 So. 187, held that where lands are bid in at a tax sale and subsequently a certificate of assignment is issued according

to statute, such assignment vests in the assignee or his legal representative the right and interest evidenced by the certificate of the original purchaser, whether that purchaser at the tax sale was the State or a third party.

The only reasonable and logical deduction from a careful reading of the statutes involved and the opinions construing same is that Act No. 81, supra, applies only in cases where the State has not parted with its title either by an assignment of the certificate of purchase or a deed from the State Land Commission. In either the purchaser pays interest to the State. To hold otherwise would require a purchaser from the State of lands bid in by the State to pay interest and then let one, who has the right to redeem, redeem said property without the payment of interest or the refunding of the interest paid.

The above construction does not nullify the provisions of Acts 1935, p. 1112, which protects the rights of the holder of a recorded mortgage. Said Act has a field of operation in redemption from the State under Act No. 81, supra.—See Quarterly Report of Attorney General, Vol. VII, p. 262, supra. It also has a field of operation in regard to the methods of redemption from individuals in accordance with the statutes pertaining specifically thereto.—See Quarterly Report of Attorney General, Vol. IV, p. 151, and opinions cited.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 24, 1938

Hon. H. M. Hughes,
Clerk of the Circuit Court,
Madison County,
Huntsville, Alabama.

(1) Where a criminal case has been affirmed by the Supreme Court or Court of Appeals, the defendant has fifteen days after affirmance in which to deliver himself to the authorities to begin his sentence, but, if in the meantime, the Governor grants the defendant a temporary parole which carries it beyond the fifteen days and the defendant fails to present himself at the end of the parole, the appeal bond of the defendant cannot be returned forfeited. The convict is simply a parole violator.

(2) Until a convict is delivered to the penitentiary authorities the costs of the prosecution cannot be paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 31, 1938, in which you request my opinion as follows:

"I request your opinion as follows: A defendant was convicted of a felony charge and sentenced to the State Penitentiary in Madison County Circuit Court and an appeal was taken to the Court of Appeals of Alabama. The Court of Appeals affirmed the Circuit Court sentence, and on the day the said defendant's fifteen days were

up for his surrender to the Sheriff to begin working out his sentence, the Governor paroled him for sixty days — without his reporting to Convict Dept. At the expiration of the sixty day's parole he was given an additional sixty days parole. When the second parole time was up, he failed to surrender and is now a parole violator.

"I wish to know whether or not the bondsmen in his case to the Appellate Court are liable on his bond, when the Governor paroled him before he forfeited same.

"When the defendant was first paroled, I mailed a transcript and cost bill to the State Convict Dept. for his case. Can they refuse payment of the Court costs in this case until he has been received by them?"

It is my opinion, under the facts you state, the appeal bond cannot be returned forfeited. I call your attention to Section 3245, Code of Alabama, 1928, (Michie), which is as follows:

"Section 3245. EFFECT OF UNDERTAKING WHEN APPEAL SUSTAINED.—When the defendant in a case of misdemeanor or felony is sentenced to hard labor or imprisonment, or to the penitentiary, and gives bail pending the appeal, and the judgment of conviction is affirmed or the appeal is dismissed, he is bound by the undertaking of bail to surrender himself to the sheriff, at the county jail, within fifteen days from the date of such affirmance or dismissal; and if he shall fail to do so, the sheriff must indorse the bail bond forfeited and a writ of arrest must be issued by the clerk, and if not executed another must be issued, and so on until the judgment has been executed. If the defendant is taken on such writ, or if he shall surrender himself to the sheriff, the sentence must, without delay, be carried out as if no appeal had been taken."

You will note from the above, if the defendant appeals his case, whether it be a felony or misdemeanor, to the Supreme Court or Court of Appeals, and the case is affirmed, he has fifteen days after affirmance in which to surrender himself to the sheriff to perform his sentence, but if in the interim the Governor grants the defendant a temporary parole for any term beyond the fifteen days, it is my opinion this takes the case out of the jurisdiction of the court and places it in the hands of the executive department of which the Governor is the head, and the appeal bond has performed its function. The statute above quoted fixes the limitations as to the responsibility of the bond and that is up to fifteen days after the case is finally affirmed by either the Supreme Court or Court of Appeals. It is not within the power of the Governor or anyone else to extend this liability, and, as stated above, if the Governor does this, as in the present case, and the convict violates his parole, he is simply a parole violator and nothing more.

Answering your second request as to the payment of costs, I call your attention to an opinion of this office written March 16, 1937, to Hon. S. L. Johnson, Clerk of the Circuit Court of Calhoun County, where it is held that the State is not required to pay costs until the defendant is delivered to the Convict Department under Section 3670, Code of Alabama, 1923, which provides, "No costs shall be paid until the convict has been delivered to the penitentiary officials. * * *".

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 24, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
CAPITOL.

The amount of mileage tax which a motor carries for hire is required to pay is based on the rated carrying capacity of the vehicle as prescribed by the manufacturer. The fact that the owner of a vehicle adds to the carrying capacity of the vehicle does not change the rated capacity thereof insofar as tax purposes are concerned.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I am in receipt of your letter of July 12, 1937, which is as follows:

"Under Article 6, Section 22, the rate at which mileage tax is paid is based on the rated capacity of trucks as rated by the manufacturer. This rating by the manufacturer is made for tax evasion purposes and is all out of line with the carrying capacity of the truck, as proved by the loads continuously carried.

"In addition to this, some operators buy a straight job truck with manufacturer's rating of one and one-half tons, as sent out by the factory. The operator will then add to this equipment additional axles and wheels, and thereby build up his load carrying capacity.

"I contend that by the addition of wheels and axles, the rated capacity should be changed as it was based on the equipment as sent out by the manufacturer and the intent of the law was rated capacity as operated over the highways of the State."

Section 22 of Act No. 159, H. B. 113, approved October 28, 1932 (General Acts 1932, pages 178, 183) provides in part as follows:

"A mileage tax of one-half cent per mile on all vehicles transporting property with a rated carrying capacity of less than 2 tons."

The Supreme Court of this State in the case of **State v. H. M. Hobbie Grocery Co.**, 285 Ala. 151, 142 So. 46, in defining what was meant by the words "one ton less than two tons," held that the words referred to the manufacturer's rated carrying capacity.

It is my opinion that the statute here under consideration must likewise be construed to mean rated carrying capacity as fixed by the manufacturer.

In view of the decision of the Court just above referred to and a decision of the Supreme Court of Tennessee in the case of **Memphis Steam Laundry Co. v. E. B. Crenshaw**, 166 Tenn. 168, 61 S. W. (2) 669, I am constrained to the conclusion that the State Tax Commission cannot give to a truck or motor vehicle a rated carrying capacity different from that fixed by the manufacturer, even though the purchaser or owner of such truck or vehicle has added thereto such equipment as to enable it to carry additional loads.

In the Tennessee case just above referred to, the owner of a Ford automobile converted it into a truck. There was no tax due on the vehicle as long as it was operated as an automobile, but there was a State statute levying a tax on motor trucks. The taxing authorities attempted to fix a

rated carrying capacity for the vehicle as converted and collect taxes thereon. The Supreme Court of Tennessee held as follows:

"In imposing the tax on motor trucks graduated according to ton carrying capacity, it seems obvious that the taxing statute refers to the 'factory rating' as the exclusive standard by which the amount of the tax is to be computed."

"We think it clear that, therefore, in the case of a small truck, a manufacturer's rating is essential to the imposition of the ton capacity tax. Although it be conceded that the vehicle in question is a truck, if it has been given no capacity rating, the exclusive standard for measuring the tax, fixed by the Legislature, is absent, and the tax cannot be collected."

"We do not think the Legislature intended to lay the question open to proof of this character. We think the term 'factory rating' refers to the customary announcement issued and published by the manufacturer of commercial trucks in placing them upon the market. It was not intended to refer to a standard which might or might not be established by proof in a controversy with each taxpayer."

In view of the above cited authorities, I am of the opinion that the tax must be based upon the rated carrying capacity as fixed by the manufacturer, and that the State Tax Commission does not have the authority to fix a different rated "carrying capacity."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Licenses—A person engaged in the business of selling at wholesale from trucks to retailers for resale bottled fruit juice drinks, non-alcoholic and non-carbonated, must pay the State license levied by Schedule 129 of Section 348 of the 1935 Revenue Act on wholesale dealers in non-alcoholic, non-carbonated or other soft drinks, and one half of the amount of said license to the county, in each county in which he so engages in business, and must also pay the regular transient dealer's license levied by Schedule 147 of Section 348 of the 1935 Revenue Act of $30.00 to the State in one county and $5.00 to each county in which he so engages in business.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter as follows:

"I have a request from a Mobile concern for a license to sell at wholesale from their trucks, bottled fruit juice drinks, non-alcoholic and non-carbonated. These drinks are put up in Mobile County. The applicant has purchased wholesale soft drink license in Mobile County.

He does not state whether he is paying a Bottler's license and it seems that he has not purchased a State Transient Dealer's license. The 1935 Revenue Code, many parts of it, is beyond my comprehension. Please advise what license this concern must purchase in Conecuh County in order to sell at wholesale, drinks manufactured by them, in this County."

First, it should be stated that persons dealing in bottled fruit juice drinks, non-alcoholic and non-carbonated, are subject to the appropriate license levied on the various classifications of dealers in non-alcoholic, carbonated or other soft drinks, even though the fruit juices are non-carbonated. See opinion of the Attorney General to Hon. G. W. Robertson, Judge of Probate, Baldwin County, Bay Minette, Alabama, under date of March 4, 1937, Quarterly Report of the Attorney General, Vol. II, p. 257.

Inasmuch as the person described in your letter of inquiry has paid a wholesaler's license, that is, the license levied by Schedule 129 of Section 348 of the 1935 Revenue Act on persons engaged in the business of selling at wholesale non-alcoholic, carbonated or other soft drinks, in Mobile County, it is safe to assume that he is not a bottler of soft drinks, or he would not have been subject to the payment of the license levied by Schedule 129, because of the exemption of bottlers from said license contained in said schedule. Therefore, our opinion will treat the applicant for license as merely a person engaged in the business of selling at wholesale from trucks to retailers for resale bottled fruit juice drinks and not as a bottler of said drinks.

The license on persons engaged in the business of selling at wholesale non-alcoholic, carbonated or other soft drinks is levied by Schedule 129, supra, which reads as follows:

"Each person engaged in the business of selling at wholesale non-alcoholic, carbonated, or other soft drinks, shall pay an annual license of Fifty Dollars ($50.00). Provided that bottlers who have taken out bottle license for operating plants in this State shall not be liable under this Schedule, nor shall such bottlers be liable for any county or state license under Schedule 146 hereof, nor as transient vendors or dealers or peddlers."

Subsections (a) and (b) of Section 350 of the 1935 Revenue Act provide:

"(a) Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided. (b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

Therefore, such a person must pay the license levied by Schedule 129 and one-half of that amount to the county in each county in the state in which he so engages in business. This notwithstanding the fact that it might be said that he actually has no fixed or established place of business in any county in the state, for it may be said that he has a place of business in each county in which he so deals. Cf. Opinion to Hon. W. G. Little, Judge of Probate, Sumter County, Livingston, Alabama, under date of November 29, 1935, Quarterly Report of Attorney General, Vol. I, page 255 and opinion to Hon. Roy Sanderson, Judge of Probate, Marion County,

Hamilton, Alabama, under date of June 14, 1938, a copy of which is enclosed herewith for your information.

Said person is also liable for the regular transient dealer's license levied by Schedule 147 of Section 348 of the 1935 Revenue Act which reads in pertinent part as follows:

> "Each person doing business as a transient dealer as defined in this schedule and who does not pay privilege license under Schedule 33, or the license permit under Schedule 159.16 shall pay an annual license tax to the state of $30.00. The payment of one state license shall authorize such transient dealer to engage in such business in any county in the state upon the payment of county license of $5.00 in each county."

Then follows the definitions of transient dealers. It is not necessary to here set out all of those definitions to show that the person engaged in business in the manner described in your letter of inquiry is a transient dealer. He certainly is engaged in the business of going from dealer to dealer and selling goods, wares and merchandise for resale by a retailer, which brings him within the definition of the term "transient dealer" contained in subsection (b) of said schedule, which reads as follows:

> "All persons acting for themselves or as an agent, employee, salesman, or in any capacity for another, whether as owner, bailee or other custodian of goods, wares, and merchandise, and going from person to person, dealer to dealer, house to house, or place to place, and selling, or offering to sell, exchanging or offering to exchange, for resale by a retailer, any goods, wares and merchandise,"

That he is liable for the license levied by this schedule notwithstanding the fact that he is also liable for the license levied by Schedule 129 is made very clear by the provisions of Section 357 of said Act which reads as follows:

> "Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

It might be well to here point out that the special license on transient dealers in bakery products and soft drinks in any county other than the county where the person maintains his bakery plant or bottling plant, as the case might be, of $20.00 and $5.00, which is levied by subdivision 3 of subsection (k) of Schedule 147, is not here applicable, since it applies only to transient dealers in soft drinks who are also bottlers thereof, if it has any application to transient dealers in soft drinks at all, in view of the exemption of bottlers from licenses other than the license levied by Schedule 26, which is contained in Schedule 129. Since this provision could not be applicable to the person described in your letter of inquiry, he not being a bottler, it is not necessary for us to decide, and we do not decide, the question of whether or not this provision contained in subdivision 3 of subsection (k) of Schedule 147, supra, prevails over the exemption contained in Schedule 129, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. V. H. Wood,
Superintendent of Education,
Franklin County,
Russellville, Alabama.

County Board of Education without authority to make appropriation out of the Minimum Program Fund to County Health Department (Gen. Acts, 1935, p. 714).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"I note that a recent ruling by your office prohibits county boards of education appropriating educational funds for payment of salaries of county farm and home demonstration agents because no such provision is made in the state minimum school program act.

"Please advise me if this ruling is also applicable to payments made to the County Health Department. The Franklin County Board of Education has been paying $1000 annually to the County Health Department, and I would like to know if this is a legal expenditure under the minimum program."

The opinion to which you refer was addressed to Hon. H. E. Williams, Superintendent of Education of Lauderdale County, under date of February 4, 1938 (Quarterly Reports of Attorney General, Vol. X, p. 7). This opinion laid the precedent for a strict construction of the so-called Minimum Program Act (Gen. Acts 1935, p. 714), and the uses for which such Minimum Program fund could be employed.

I have carefully read Sections 1 and 2 of the said act and I am unable to find authority therein, or elsewhere in the Act for expending the moneys provided for under the Minimum Program fund for payments to the County Health Department.

I therefore advise you that the reasoning employed in the William's opinion hereinabove referred to, is applicable to the payments made to your County Health Department and that such expenditures are illegal under the Minimum Program Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Licenses—Where a street fair or carnival does not maintain its permanent winter quarters in Alabama, it would not be entitled to the exemption designated under Schedule 24 of Section 348 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 17, in which you request my opinion as follows:

"As State Comptroller, I respectfully request your opinion as to whether, under the facts hereinafter stated, a corporation was chargeable with a license for operating or conducting a carnival, specified by Schedule 133 of the License Schedule in the 1935 Revenue Law?

"The corporation was incorporated in Montgomery County, Alabama; its principal place of business was stated to be the City of Montgomery, Alabama; it maintains its permanent winter quarters in the City of Montgomery, Alabama. It pays the taxes required of corporations to the State of Alabama, and is subject to and pays an income tax to the State of Alabama. The stock of said corporation is owned by citizens of Montgomery County, Alabama. The personal property used in the conduct of the carnival business is owned by one of the stockholders, who rents it to the corporation. Said property is assessed in Montgomery County, Alabama, by said stockholders, who has paid the taxes thereon.

"During the winter of 1936 the buildings in Montgomery County, Alabama, where the corporation maintained its permanent winter quarters, were destroyed or damaged by fire, and a large part of the show equipment and property used in the conduct of the carnival business was then temporarily moved to Atlanta, Georgia, where it remained for a part of the winter of 1936. Such removal was necessitated because of the damage by fire to the corporation's permanent winter quarters in Alabama.

"Is such a corporation exempted as to first four weeks' rehearsal performances in 1937 in this State from the license specified in Schedule 133 by the provisions in Schedule 34 of the License Schedule of the 1935 Revenue Act—'that the terms of this act shall not apply to the operation or conduct of any street fair or carnival for the first four weeks' rehearsal performances after closing of winter quarters in this State, owned by any citizen of this State or by any corporation organized under the laws of this State and having its principal situs in Alabama and maintaining its permanent winter quarters in Alabama, whose property is subject to and pays to the State of Alabama a tax on its real and personal property under any law of this State'?"

Your request does not show just how much of the winter quarters season was spent in Montgomery or Alabama before the winter quarters of the carnival or street fair in question was moved to Atlanta. But as I see it this makes no difference as the law provides that for a carnival or street fair to be entitled to the four weeks' exemption provided for in Schedule 34 of Section 348 of the Revenue Act of 1935, it must have its principal situs in Alabama and maintain its **permanent winter quarters** here.

You will note the word **permanent**, this simply means that such winter quarters shall be maintained with the carnival or street fair intact. It does not mean that the paraphernalia of the show be stored and the personnel of the show scattered throughout the various parts of the country.

As above emphasized, it is my opinion that the legislature in granting this unusual exemption, did so on the theory that the permanent winter quarters meant the wintering of all equipment and the wintering (residence) of all the major portion of the personnel and employees of such street fair. The "residence" of these persons contemplated the expenditure of their living expenses within the State. In other words, the exemption of four weeks designated as "rehearsal" is given for the reason the show has been in permanent winter quarters in the State.

Therefore, I am of the opinion if the carnival or street fair you refer to did not maintain its permanent winter quarters in Alabama, for the entire season, it would not be entitled to its exemption of four weeks' "rehearsal period." The fact that the building where the winter quarters were being maintained was damaged by fire so as not to be suitable for such winter quarters, could make no difference. The fact remains the show did not maintain a permanent winter quarters in Alabama, but a part of the same was spent in Atlanta, Georgia for the winter of 1936.

Therefore, as stated above, it is my opinion this concern does not come under the exemption clause of Schedule 34, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Costs and Fees—Court of Common Pleas of Montgomery County—(General Acts 1931, p. 11).

1. When judge sits as committing magistrate on preliminary hearings, the same costs and fees attach as in other preliminary hearings.

2. In case of final jurisdiction, the regular county court fees attach except in cases otherwise specifically provided in said Act.

3. The witness fees of fifty cents per day and five cents per mile provided for in Section 43 of said Act attach in case of final jurisdiction.

4. In case where defendant is sentenced to hard labor the Board of Administration pays the witness fees provided for in Section 43 of said Act, supra.

5. Witness fees do not attach and become payable unless witness appears in answer to subpoena and claims attendance. It is not necessary that he testify.

6. Said court is a court of record.

7. It is the duty of clerk to keep final record.

8. Clerk entitled to 5% commission on remittances to State, but said commission is paid into County Treasury.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 6, 1938, which is as follows:

"Please refer to Act No. 12, S. 11, approved February 5, 1931, (General Acts 1931, p. 11), which Act creates the Court of Common Pleas of Montgomery County, and, with particular reference to Sections 22, 37 and 43 thereof, and kindly advise as follows:

"1. What fees are chargeable when the judge of said court sits as a committing magistrate exercising preliminary jurisdiction?

"2. What fees, other than witness fees, are chargeable in misdemeanor cases where the Court exercises final jurisdiction?

"3. What is the proper witness fee chargeable, in view of Section 43 of the Act under consideration, Acts, 1932, p. 102, and Section 96 of the Constitution, in cases of final jurisdiction?

"4. What witness fees are properly payable out of the convict fund in cases where the defendant is sentenced to hard labor?

"5. When do the witness fees attach and when do they become payable?

"6. Is this Court a Court of Record?

"7. Is it the duty of the Clerk of said Court to make and keep final records in cases in which the Court has final jurisdiction?

"8. Is the Clerk of this Court entitled to receive 5% commission of **any and all** sum or sums collected by said Clerk for the State of Alabama as compensation for the collection and remittance of the same, the said percentage to be deducted by said Clerk from his remittances to the State?"

Before specifically answering your inquiries, I wish to set out in general the laws governing the costs and fees of said Court.

The Court of Common Pleas of Montgomery County is now functioning by virtue of Act No. 12, S. 11, approved February 5, 1931, (General Acts 1931, p. 11). Section 8 of said Act which fixed the judge's compensation, was amended by General Acts 1935, p. 163. Said Court is an inferior court exercising the jurisdiction of justice of the peace courts in certain precincts and also has jurisdiction of all misdemeanors committed in the county. The judge of said court has the authority of a committing magistrate. In other words, the court is a combination of a justice of the peace court and a county court.

The general provision relative to costs and fees in said court is governed by Section 37 of the Act under consideration. Said section provides as follows:

"Section 37. That the fees and costs in criminal cases in such court, shall be the same for like services as are now or may be hereafter provided by law in such cases in and for the county courts of the state, except as herein otherwise may be provided, and shall be taxed and collected by the clerk of such court, and when collected shall be paid once a month into the treasury of said county. Execution may issue for fine and costs or any part thereof remaining unpaid as in civil cases."

It will be seen from the above that county court costs and fees attach in criminal cases in said court except as otherwise provided. Therefore, the Act must be considered as a whole to find the exceptions. In this connection, I wish to refer you to Sections 22, 35 and 43 of said Act.

1. In answer to your first inquiry, I am of the opinion that the costs and fees that attach when the judge sits as a committing magistrate on preliminary hearing are the same as those in other preliminary hearings.—**Opinion of Attorney General to State Board of Administration, May 19, 1931.** When the judge of said court sits as a committing magistrate he does not act as judge of said court but only as any other committing magistrate, and the same costs and fees attach accordingly and not costs and fees provided for by reference for the Court of Common Pleas of Montgomery County. The costs and fees in such cases are governed by Section 3755 in connection with Sections 3753 and 3771, Code of 1923.

"Section 3755. COSTS AND FEES IN PRELIMINARY TRIALS. — Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs of the committing magistrate and constable on preliminary trial, both together, not to exceed ten dollars, and the fees of the state's witnesses before the committing magistrate, not to exceed ten dollars, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way, as is provided by law for the payment of other items of costs incurred by the state; but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

The costs and fees on preliminary hearings do not attach unless the conditions precedent of Section 3755, supra, have been met and are limited as therein specified.

Section 3753 deals with the fees of justice of the peace as committing magistrate, and Section 3771 deals with the witness fees that apply.

In this connection, I wish to state that the amount paid by the Board of Administration in case of a final conviction and sentence to hard labor is limited to $5.00 under Section 3667, Code of 1923.

2. In answer to your second question, I again wish to refer you to Section 37 of the Act under consideration, above quoted. In my opinion, the regular county court costs and fees attach in misdemeanor cases where the court exercises final jurisdiction, except as otherwise provided in said Act. The exceptions are found in Sections 22, 35 and 43.

The costs and fees in county courts are governed by Sections 3758 and 3759, Code of 1923. In this connection, I wish to refer you to an opinion of the Attorney General rendered to the State Comptroller on June 14, 1938, a copy of which is herewith enclosed. Said opinion construes Section 3758, supra.

The exception to regular county court costs and fees in Section 22 of the Act under consideration presents a peculiar situation. Said section provides as follows:

> "Section 22. That the judge of such court shall be a magistrate and conservator of the peace, may take affidavits and issue warrants in felony cases returnable before himself or other magistrates having jurisdiction, and may take affidavits and issue warrants for misdemeanors directly returnable to himself when said court shall have final jurisdiction of the offense, or in cases where said court does not have final jurisdiction to any court having final jurisdiction thereof. And in addition said judge may take affidavits and issue warrants in misdemeanors directly returnable to any other court having final jurisdiction thereof, although said court also has final jurisdiction in said misdemeanor. For his services in taking affidavits and issuing warrants the said judge is entitled to the compensation now provided by law to justices of the peace, or which may hereafter be provided, which shall be taxed and collected as such costs are now taxed and collected in criminal cases, and when said costs shall have been collected they shall be paid into the county treasury by the clerk who shall collect and receive said costs."

Under the above quoted section, the fees of a justice of the peace attach when the judge takes the affidavit and issues the warrant. Referring to Section 3753 of the Code of 1923, the fees for these two services total 75c, viz., "For complaint made before him 25c," and "Issuing warrant of arrest 50c." However, for the other costs and fees of the judge that attach reference to Section 3858, supra, is necessary.

The regular fees of the clerk of the county court attach in this class of cases under Section 3358, supra, in connection with Section 3739, Code of 1923.

The sheriff's fees, another exception to Section 37, supra, are governed by Section 36 of the Act.

Witness fees, under Section 43 of the Act, another exception to Section 37, will be considered in a discussion of your next inquiry.

3. In answer to your third inquiry, I am of the opinion that Section 43 of the Act under consideration, governs the payment of the witness fees in question. Section 43 of the General Acts of 1931, p. 11, provides as follows:

> "Section 43. That the fees of witnesses in such court shall be fifty cents per day, and five cents per mile for each mile traveled to and from the court and place of residence of the witnesses by the usual traveled route, and shall be paid in misdemeanor cases in the same manner in which such fees are now paid in the circuit courts of the State. Provided that all witnesses either in civil or criminal cases in attendance upon such court must prove their attendance within five days after the termination of the trial of the cause in which they are subpoenaed, or call to testify, and unless they shall prove their attendance within such five days their fees shall not be taxed as costs, nor shall they be recoverable against either party. The fees of witnesses, in all criminal cases where no conviction is had shall be governed by the provisions of law applying to similar services in the circuit courts or in preliminary proceedings. That if said fees are not called for within three months after paid into said court they shall be forfeited and paid into the county treasury."

The General Acts of 1932, Extra Session, p. 102, provides in part as follows:

"Section 1. That section 3762 of the Code of Alabama, 1923, be amended so as to read as follows: 3762 (6659) (4583) (4886) (5059) (4347) (796) FEES AND COMPENSATION OF WITNESSES. Witnesses in criminal cases are entitled to seventy-five cents per day and five cents for each mile to and from their residence by the route usually traveled, and all necessary ferriages and toll."

In my judgment the General Acts of 1932, p. 102, above quoted is intended to amend and is confined in its influence to Section 3762 of the Code of 1923. At the time Section 3762 was adopted in the Code of 1923, Section 3771 of the said Code was also adopted. Section 3771, supra, provides as follows:

"Section 3771. WITNESSES' FEES BEFORE JUSTICES OF THE PEACE. In all criminal cases before justices of the peace, unless otherwise provided, witnesses are entitled to fifty cents per day, while in attendance on the trial, to be taxed in the bill of costs."

You will note that this section provides for witness fees in courts of the justice of the peace. The fees in the court here under consideration are the same as in the county courts unless otherwise provided as shown by Section 43 of the General Acts of 1931, p. 11, above quoted.

It is true that both the Acts of 1932, supra, and the Acts of 1931, supra, are general laws, and deal with the question of costs of courts, which our Constitution requires shall be uniform throughout the State. See Section 96 of the Constitution. It is further true, however, that by Constitutional Amendment, Montgomery County is removed from the inhibitions of Section 96 of the Constitution, supra. (See Amendment to Constitution IV.)

The Appellate Courts of Alabama, speaking to this question in the case of **Barnes, Court Clerk v. State ex rel Tate,** 162 So. 404, 406, has held that witnesses in criminal cases are entitled to 75c rather than $1.00, throughout the State except in Jefferson and Montgomery Counties where this fee may be regulated by the Legislature by virtue of Constitutional Amendments.

The Acts of 1932, p. 102, is a general Act and in its scope covers the entire subject under consideration in a general way. Ordinarily when a statute covers the entire field of operation of an earlier statute it must necessarily be held to repeal the former statute. See 59 **Corpus Juris,** p. 919; **Allgood v. Sheffield Steel and Iron Co.,** 71 So. 724, 196 Ala. 500.

In the instant case, however, a very different situation exists. It is true that the provisions for witness fees in the Court of Common Pleas, in Montgomery, as set out in the Acts of 1931, p. 11, Section 43, are contrary to the provisions of the Acts of 1932, p. 102, supra, since the costs of courts in Montgomery County are removed from the influence of Section 96 of the Constitution of Alabama, by Amendment IV to the Constitution, (See Barnes v. State ex rel Tate, supra). The only question left for consideration is whether or not the General Acts of 1932, p. 102, by its broad and general terms affects the repeal by implication of the General Acts of 1931, p. 11, Section 43. In my judgment, the General Acts of 1931, p. 11, supra, is a specific Act covering a specific purpose and applicable only in counties of a specified population. This being true the rule of law that repeal by implication is not favored militates against the possibility of the repeal by the General Acts of 1932, supra, of the provisions of the General Acts of 1931, supra. This conclusion is further definitely authorized by the holding of the court in the case of **City of Mobile et al. v. Mobile Electric Co.,** 84 So. 816, wherein the rule is laid down as follows:

"Repeal by implication is not favored and it is only when two laws are so repugnant or conflicting that it must be presumed the Legislature intended the latter should repeal the former, that there is a repeal by implication, but both will be given effect when possible."

"A law specially providing for a special subject will not be considered repealed by a subsequent law which deals with a general subject in a general way, though the specific subject and a special provision may be included in the general subject and the general provision."

The premises considered, it is my judgment that the Legislature intended that the witness fees in criminal cases in the Court of Common Pleas should be and are governed by the provisions of Section 43 of the General Acts of 1931, p. 11.

I wish to further refer you to an opinion of the Attorney General under date of May 19, 1931, Vol. 4, Office Edition for May, June, 1931, a copy of which I enclose for your convenience.

4. In reply to your fourth inquiry, I wish to advise that in my opinion in cases wherein defendants are sentenced to hard labor, the Clerk of the Court of Common Pleas of Montgomery County should charge fifty cents per day as witness fees in cost bills sent to the Convict Department, which sum is legally and properly chargeable by the clerk and payable out of the convict fund, as provided for by Section 43 of the General Acts of 1931, p. 22, above quoted.

I wish to further call to your attention Section 3667 of the Code of Alabama of 1923, which provides in part as follows:

"3667. Costs of Conviction; items to be paid.—Whenever a defendant is convicted, and sentenced to the penitentiary the following items of costs in the case shall be paid out of the convict fund, to the extent and in the manner hereinafter prescribed, * * *"

I wish to call your particular attention to the phraseology used in the above quoted portion of Section 3667. You will note that this section provides that the items of cost shall be paid out of the convict fund **"to the extent"** of the amounts provided in this section. I wish to call your attention further to Section 3734 of the Code of 1923, which provides as follows:

"3734. No fee charged unless expressly authorized.—The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

See also cases of **Lee v. Smyley,** 16 Ala. 773; **Dent v. State,** 42 Ala. 514; **Greene County v. Hale County,** 61 Ala. 72; **Troupe v. Morgan County,** 109 Ala. 162, 19 So. 503; **Caldwell v. State,** 55 Ala. 133, wherein it is held that statutes on the subject of costs and fees are penal and must be strictly construed. Further in the case of **Redman v. State,** 8 Ala. App. 408, 409, 62 So. 992, it is held that the manifest purpose of Section 3667, supra, is to prevent useless additions to the expenses incident to the administration of criminal laws. Whether these expenses are to be paid by the defendent or by the people, the provisions of this section properly may be availed of to prevent the unnecessary increase of such expenses by the action of public officials having a pecuniary interest in making them more rather than less. The Legislature has attempted to throw every possible safeguard around the paying out of public funds in any instance. Under the rules of construction of the laws of costs and fees, only one construction may be properly reached in

the instant case. It is the evident intent of the Legislature that only fifty cents per day and five cents per mile mileage as witness fees should be paid by the Convict Department under Section 3667; that the Convict Department is authorized to pay fifty cents per day, and is not necessarily compelled to pay seventy-five cents, as provided for in Section 3667, quoted supra. In my judgment, it is perfectly clear that the Convict Department is authorized to pay any amount, not to exceed seventy-five cents per day, for witness fees in cases of this kind.

5. In answer to your fifth inquiry, I wish to advise that no witness in a criminal case is entitled to get a fee, unless said witness does appear and claims attendance in accordance with the law. The mere fact of being subpoenaed does not within itself contemplate payment of witness fees, unless such fees be earned by the witness by appearing at court in obedience to the command of the subpoena, and claiming such attendance. It is my judgment that if the State's witnesses in accordance with the command of the subpoena appear in court and claim attendance therefor within the time allowed by law, that they are entitled to the amounts set out by the General Acts of 1931, p. 11, Section 43.

6. In reply to your sixth inquiry, I wish to advise that in my judgment the Court of Common Pleas of Montgomery County is a court of record. Definitions of "court of record include decisions of courts from practically all the common law states of the United States and some from the courts of England. Unfortunately, many of these definitions are in hopeless conflict. To arrive at any definite conclusion concerning this court, it is necessary to consider those definitions of a "court of record" which might be applicable to a court of this nature. I wish to call your particular attention to Section 12 of the Acts of 1931, p. 11, which provides as follows:

> "Section 12. The judge of such court shall have the power to issue a restraining, or other proper or appropriate order to any justice of the peace or notary public ex-officio justice of the peace who assumes to exercise any of the exclusive jurisdiction of such court; and any such justice of the peace or notary public ex-officio justice of the peace may be required to show cause before the judge of such court why he should not be punished for contempt or disobedience of such order, and may punish for such contempt, by fine not exceeding fifty dollars, and imprisonment not exceeding five days, either or both."

I wish to further call your attention to Sections 17, 18, 19 and 20 of the General Acts of 1931, p. 18, which provide as follows:

> "Section 17. That all proceedings as to bail, conditional judgments, forfeitures, judgments final and alias warrants of arrest shall be the same in such court, as are now or may hereafter be provided for by law; conditional judgments may be set aside therein, reduced or made absolute; and the same orders and judgments made and taken in such matters as could be made or taken in the circuit courts of the state, and the same procedure shall be followed."

> "Section 18. That when a fine is assessed, such court may allow the defendant to confess judgment, with good and sufficient sureties, for the fine and costs, as provided by the general laws of the state. Execution may issue for the fine and costs, or any portion thereof remaining unpaid the same as in civil cases. The clerk may issue execution against the defendant and his sureties on all confessions of judgments, immediately after the adjournment of court, returnable not less than thirty nor more than ninety days after the issuance thereof, and im-

mediately deliver said execution to sheriff of the county, and after the delivery of such execution, the same shall be a lien on all property of the defendants in executions, and it shall be the duty of the sheriff to collect said execution within the time stated therein."

"Section 19. That upon a conviction of any defendant in misdemeanor cases, in said court, except prohibition cases, the court shall have the right to suspend sentence whenever in the discretion of said court the same may be advisable; under such terms and conditions and for such time as may be prescribed by said judge for the ends of justice."

"Section 20. That in any prosecution in such court if it appears to the court to be malicious or frivolous, the court shall tax the prosecutor or the person who made the complaint or affidavit with the costs, and when the costs are imposed on the prosecutor or person who made the complaint or affidavit, he may confess judgment for the same, with good and sufficient sureties, and failing to do so, or to pay the same presently, he must be imprisoned in the county jail or sentenced to hard labor for the county for ten days."

You will note that the Court of Common Pleas of Montgomery is given complete authority to fine and imprison and to do many acts conferred upon the Circuit Courts of Alabama by the general laws of this State. I wish to refer you to Words and Phrases, 1st Series, Vol. 2, page 1686, wherein the following definition of a court of record is found:

"A court of record, as defined by Blackstone, is a court having power to inflict fines for contempt. Thus, where the board of county commissioners had such power, it thereby became a court of record and its acts could only be proved by the records thereof. State v. Connor (Ind.) 5 Blackf. 325, 327."

I wish to further call your attention to Words & Phrases, First Series, Vol. 2, p. 1687:

"A court of jurisdiction is one which has jurisdiction to fine or imprison, or having jurisdiction of civil cases above 40 shillings, and proceeding according to the course of the common law. 1 Inst. 117b, 260a. Whether a court be a court of record does not depend upon the fact that it does or does not keep a record of its proceedings, or that it is or is not required by law to do so. The court of county commissioners is not a court of record. Woodman v. Inhabitants of Somerset County, 37, Me. 29, 37, 38."

I wish to further call your attention to the following definition found on the same page of Words & Phrases cited supra:

"A court that is bound to keep a record of its proceedings, and that may fine and imprison, is a 'court of record'. A justice court is within that definition. Hooker v. State (Ind.) 7 Blackf. 272, 273."

"Justices of the peace do not hold courts of record, as they do not enroll on parchment (or paper) their proceedings, and do not hold plea according to the course of common law of real or mixed actions or action quare vi et armis, or have jurisdiction beyond 40s originally. Planters' & Mechanics' Bank of Columbus v. Chipley, Ga. Dec. 50. 51, pt. 1."

I wish to call your attention further to Words & Phrases, 2nd Series, Vol. 1, p. 1117, in which the following definition is found:

"A 'court of record' is one where the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony, which rolls are called the records of the court and are of such high supereminent authority that their truth is not to be called in question. Hudson Trust Co. v. Boyd, 84 Atl. 715, 717, 80 N. J. Eq. 267 (quoting 3 Black. Com. 24)."

I wish to call your attention to the case of **Willett v. Weaver**, 87 So. 601. 205 Ala. 68, wherein the Supreme Court of Alabama held that a justice of the peace court which has no civil jurisdiction is not a court of record. I wish to further refer you to the case of **Ledwith v. Rosalsky**, 165 N. E. 688, in which the Court of Appeals of New York said, "It is clear that the selection by the organic law of a local subdivision of the state known as a 'county', for and within which to establish a court, does not make the functions of the court county functions, or the officials of the court county officers. A court of record is essentially not an office; it is an institution, an entity, or agency within itself, invested with certain functions just as the county is another agency within itself, invested with other duties to perform." I wish to further refer you to the case of **Hails v. State**, 16 Ala. App. 132, in which Judge Samford, writing for the Court of Appeals concerning the Court of Common Pleas of Montgomery County, quotes approvingly from the case of **McGehee v. State, Ex Rel. State Solicitor**, 199 Ala. 287, 74 So. 376, as follows:

"We held in the recent case of State v. Roden, 73 South, 657, that where an inferior court is set up in lieu of justices of the peace—that is, justices (of the peace) are abolished and their powers and jurisdiction are conferred upon an inferior court—the jurisdiction of the inferior court in respect of subject-matter like that of the justices of the peace whom it supersedes, may not be extended to cases of libel, slander, assault and battery, or ejectment, nor to any civil case where the amount in controversy exceeds $100, but it was not decided that in every or any other respect the inferior court must be fashioned in the exact pattern of a justices' court. If it was so intended, no purpose would be served by the alternative of the Constitution, which, to state its effect as we understand it, authorizes the consolidation of all the official functions of all the justices of the peace of a number of precincts in an inferior court the civil jurisdiction of which, as to subject-matter, shall not exceed the maximum of that jurisdiction which may be conferred upon justices of the peace. It is not to be supposed that the framers of the Constitution intended to speak of justices of the peace and the inferior court as one and the same thing, but rather that they provided for their creation as judicial institutions that might be made to differ except in respect of jurisdiction as to the subject-matter of civil causes."

You will observe from the above cited case that courts of Alabama have held that a court of record is a separate entity, an institution or agency within itself, as distinguished from an office. I wish to further call your attention to Words & Phrases, 3rd Series, Vol. 2, p. 656, in which the following definition is found: "A court of record is one, the history of whose proceedings is perpetuated in writing by some duly authorized person." You will observe from the requirements of the General Acts of 1931, p. 11, supra, that the Court of Common Pleas of Montgomery County is an inferior court established in lieu of all justices of the peace and given jurisdiction concurrent with the county courts and circuit courts in most instances. You will further observe that this court is required to keep a record of all its proceedings. See Section 9, which provides in part as follows:

"* * * It shall be the duty of said clerk to keep a docket of civil cases, in which must be entered all the civil actions brought each term,

the names of the parties, the character of action, the name of the attorney by whom the same are brought, and the sheriff's return; and in which must be entered all the civil cases standing for trial at each term, in the order in which they are brought, and the orders which have been made in each case at any term. To keep a docket of criminal cases, in which must be entered all the criminal cases in their order, the character of the offense, the return of the sheriff, the orders which have been made in each case at any term, and the names of the attorneys for the defense. To keep in said dockets for civil and criminal cases, in which must be entered the cases in which any subpoenas are issued, the names of the witnesses, the time of the issue and the return of the sheriff, and also in which must be entered every execution issued, specifying the name of the parties, the amount of the judgment and the day and the year of its rendition, the amount of costs, the character of the execution, the date of its issue, the person to whom delivered, and the date of such delivery, the day when returned, the return in full on the same page on which the execution is entered; and the number of the execution. To enter the minutes of each day's proceedings during the term of the court, and all orders and judgments made or rendered in the order in which they are made or rendered. To keep all the papers, books, dockets, and records belonging to his office, with care and security; the papers filed, arranged, numbered and labeled, so as to be of easy reference; and the books, dockets, and records, properly lettered; and to allow parties to inspect the records free of charge. To make out and deliver, on application and payment of the legal fees therefor, to any person applying for the same, a correct transcript, properly certified, of any paper or record in his office. To make out transcripts as required by law, in all cases, in which an appeal is taken therein. To keep direct and reverse indexes of all record books in his office, which must always be in good and substantial, well bound books. Such clerk must keep his office at the court house."

Premises considered, it is my opinion that the Court of Common Pleas of Montgomery County is a separate entity, an institution which is required to keep a complete and accurate record of all of its proceedings, permanently enrolled upon parchment or paper and bound, for public inspection. In my judgment, the Court of Common Pleas of Montgomery County is a court of record.

7. In reply to your seventh inquiry, I wish to advise that in my judgment the Court of Common Pleas of Montgomery County is a court of record and that the clerk of such court should keep final records in cases in which the court has final jurisdiction.

8. In reply to your eighth inquiry, I wish to refer you to the General Acts of 1931, p. 669, Senate Bill 291, Hildreth:

"Section 1. That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive five per cent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected."

You will note that the above Act provides for the payment of five per cent commission on any sum or sums collected by a Circuit Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same. While it is true that Sections 9 and 15 of the General Acts of 1931, p. 11, do confer many of the powers,duties and much of the authority

of circuit clerks upon the clerk of the court here under consideration, you will note the authority and the duties set out in the above sections are specific and have set purposes which are named therein. I refer you to General Acts 1931, p. 15, which provides in part as follows:

> "* * * The said clerk of such court shall have the power and authority to administer oaths and take acknowledgements and affidavits in all cases in which oaths and affidavits are required by law, and to sign and issue all processes issuing out of such court, including warrants, affidavits, summons, subpoenas, writs, executions, committments, and releases of such court, and to fix bail in all cases where the party charged with crime is entitled to bail under any warrant issued by him; and to issue any and all other processes necessary for the conduct of the business of such court, and to approve all bonds in civil cases, and enter all judgments and orders of the court; and he shall certify all appeals, certiorari and transcripts; but all judgments and orders of such court shall be signed by the judge thereof. In addition to the powers herein conferred upon said clerk by this act, he shall have all of the powers and authority ministerial and judicial now or hereafter vested in the clerks of the circuit courts of the state. * * *"

On page 17 of the said Act as follows:

> "* * * The clerk of such court is hereby authorized and given the right, power, and authority to take and receive complaints and affidavits, and issue warrants of arrest the same as judges of the county courts in this state are authorized to do under its general laws; and all such warrants of arrest shall be made returnable to such court."

The question of whether or not the Clerk of the Court of Common Pleas of Montgomery is placed in the same category as a circuit clerk and comes within the purview of the provisions of the General Acts of 1931, p. 669 above cited, so as to authorize the collection of the commission therein named, presents itself for decision. I wish to particularly call your attention to the following provisions found on page 15 of the General Acts of 1931, as follows:

> "* * * In addition to the powers herein conferred upon said clerk by this act, he shall have all the powers and authority ministerial and judicial now and hereafter vested in the clerk of the circuit courts of the state. * * *"

In my judgment this provision read in connection with the General Acts of the Extra Session of 1932, p. 102, quoted supra, furnishes definite authority to the clerk to collect and retain five per cent commission of all moneys collected for the State of Alabama by authority of the above named Acts. Of course, you understand that all money collected by the clerk of this court as fees must necessarily be remitted to the county treasury in accordance with the requirements of Sections 36-38 of the General Acts of 1931, p. 11, which require the remittance into the treasury of the county once a month of all fees collected.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

Constitutional Law—Courts of County Commissioners—

1. Local statute changing compensation of members of Courts of County Commissioners from that provided by general law, is unconstitutional.

2. Local statute changing compensation of Probate Judge as member of the Court of County Commissioners from that provided by general law, is unconstitutional.

3. Local statute changing form of county governing body from Court of County Commissioners to County Board of Revenue or like tribunal and providing that chairman shall be other than a probate judge, and providing compensation for such chairman different from that provided by general law for the probate judge for similar services in connection with Court of County Commissioners, is not constitutionally invalid as violative of Subdivision 24 of Section 104 nor of Section 105 of the Constitution.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. Is a local law, passed since the adoption of the 1901 Constitution, wherein the compensation of the four Commissioners is fixed on a different basis of pay from the compensation as provided for by the Code, constitutional?

"2. Is a local law, passed since the adoption of the 1901 Constitution, wherein the compensation of the Judge of Probate for services in connection with such Commissioners' Court is fixed on a different basis of pay from the compensation as provided for by the Code, constitutional?

"3. When by local legislation the Commissioners' Court, as created by the General laws, is abolished and another governing body is established wherein the Chairman is a person other than the Probate Judge and the compensation of the Chairman is fixed by such local legislation, is that part of such law constitutional?

Your first inquiry must be answered in the negative. **Carnley v. Moore,** 218 Ala. 274.

In that case the Supreme Court had under consideration a local act passed at the 1927 Session of the Legislature (Local Acts of 1927, page 395) which undertook to change the compensation of the Commissioners Court of Coffee County from that provided by general law. The Court said:

"The provisions of the act, under which salary, fees, or compensation of petitioner is sought to be compelled of payment by mandamus or as a local act, are violative of section 96 of the Constitution denying the right of the Legislature to enact a law not applicable to all the counties of the state, regulating costs and charges of courts, or fees, commissions, or allowances of public officers, Birmingham Elec. Co. v. Harry, 215 Ala. 458, 111 So. 41; Vaughan, Judge of Probate v. State ex rel. Barker, 212 Ala.

461, 103 So. 38, and was an allowance to a public officer within the inhibition of subsection 24 of section 104 of the Constitution, Brandon v. Askew, 172 Ala. 160, 54 So. 605; Osborn v. Henry, 200 Ala. 353, 76 So. 119; Jackson, Clerk v. Sherrod, Dep. Sol., 207 Ala. 245, 92 So. 481.

"The claim or compensation sought by the official was likewise offensive to the provisions of sections 68 and 281 of the Constitution, being in the nature of an increase of the county official's compensation during the 'term of his office,' Stovall v. City of Jasper (Ala. Sup.) 118 So. 467; City of Birmingham v. Hawkins, 208 Ala. 79, 94 So. 62; McMurray v. County Board of Education, 216 Ala. 144, 112 So. 644, and different from that in other counties."

The conclusion of this case inescapably is applicable to the question stated in your first inquiry.

By analogous reasoning, **Carnley v. Moore,** supra, is applicable to the question posed in your second inquiry, and the same necessarily must be answered in the negative.

Your third inquiry is general and difficult of accurate answer. As I interpret it, you have in mind the case where the Legislature abolished the existing Court of County Commissioners presided over by the Probate Judge of the county and established a Board of Revenue or governing body of like nature in which is vested all the powers vested by general law in courts of county commissioners; and fixes the compensation of the chairman of such newly created tribunal at a rate different from that provided by general law for the Probate Judge when performing like services in connection with a Court of County Commissioners. On authority of the case of **Dunn v. Dean,** 196 Ala. 486, your third inquiry must be answered in the affirmative.

In that case the Supreme Court had under consideration a local act (Local Acts 1915, page 293, et seq.) which undertook to establish a Board of Revenue for Conecuh County and to abolish the Court of County Commissioners then existing in such county. The act provided that the county should be divided into five defined districts and the election of a member of the Board for and by the qualified electors in each of the five districts, and apportioned the terms of the members so that said terms should not all expire at the same time. It also provided that the members of the said board should elect the president thereof; and it provided for his compensation.

The Act was attacked, upon the ground, among others, that it was violative of Subdivision 24 of Section 104 and of Section 105 of the Constitution. Speaking to the first objection, the Supreme Court held:

"The local act under review relieved the judge of probate of certain duties that were but incidental to the service of that office and that officer, and, in consequence of the abolition of these duties, took from him (to be subsequently elected) the compensations theretofore allowed the judge of probate for these merely incidental services. Hence, the act under consideration did not, in any direct, primary sense, create, increase, or decrease the fees, percentages or allowances of a public officer. The subdivision quoted is not offended by this act."

As to the latter objection, the Supreme Court said:

"The local act mentioned is assailed as constitutionally invalid, under Section 105, because the subject-matter was, at the time of its approval, already provided for by the general law approved February 26, 1903. * * *

The subject matter of each act, the general and local, is substantially the same; the latter being more ample in legislatively fixed detail of accomplishment of the purpose common to both acts. In Green v. State, 143 Ala. 2, 7, 8, 39 South, 362, 364, it was said: 'The general law was different from this, requiring a special venire for each capital case. The relief sought by this amendment could not be obtained under any general law then existing or the local law as stated would have been unnecessary. It in no sense, therefore, offends that provision of the Constitution (Section 105) which prohibits the Legislature from enacting any special or local law by the partial repeal of a general law.'***

"It creates a body constituted of members separately chosen by the electorate of separate districts, thus excluding the judge of probate who, under the general law, was the presiding officer of the commissioners' court. This departure from a body the members of which were chosen by the electorate of the whole county, and for terms of four years (aside from the judge of probate who is chosen for a term of six years), to a body the constituents of which are elected by and from districts only, and for terms so ordered and arranged as to prevent the expiration of the terms of all the members at one time, are radical and, in proportion to the subject, superlative changes from the status fixed by general law to a status not contemplated or provided for by general laws. Our opinion, therefore, is that this act is not offensive to the quoted provisions of section 105 of the Constitution. We are advised of no provision of the Constitution that inhibits the Legislature from creating a county governing body as the result of elections of its members by the electorate of defined districts."

Although the act considered in the Dean case did not provide compensation for the president of the Board of Revenue thereby established different from that provided for the Probate Judge for like services in connection with the Court of County Commissioners under the general law, it is my opinion that the principles enunciated in that case, when applied to the facts stated in your third inquiry, resolve the question in favor of the constitutional validity of such an act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Filing Tax—The fact that a mortgage is insured by the Federal Housing Administration does not exempt it from mortgage filing tax.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of recent date as follows:

"I have had filed in my office for record a mortgage made to the First National Bank of Montgomery, Alabama, as Trustee for a certain named individual.

"The mortgage is insured by the Federal Housing Administration.

"I am familiar with the rule that the mortgage tax is not applicable to mortgages executed to National Banks, but I desire to know whether the ruling shown in O. A. G. 1932-34, on page 46 would be applicable to the instant case. Please let me have an opinion on this matter at once."

As you state in your request, this department has held that a mortgage is subject to the mortgage tax before filing, where a national bank is the mere trustee. 1932-34 Opinions of Attorney General at page 46.

I am of the opinion that the fact that the mortgage is insured by the Federal Housing Administration would not exempt it from taxation, and that you should require the payment of the mortgage tax before accepting the mortgage for filing.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Enterprise, Alabama.

Goods ordered on September 30, 1936, for which the purchase price was unpaid, and which were not delivered until March 1, 1937, would be subject to what is known as the Alabama Sales Tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 12, 1938, in which you request my opinion as follows:

"I would like to know if a person or a merchant can legally charge and collect sales tax on an item which was ordered on September 30, 1936 but was unable to deliver until on March 1, 1937. The date of March 1, 1937 is the date the sales tax went into effect and the order for this article was given on September 30, 1936, but due to strike was unable to deliver until on March 1, 1937. Would appreciate your opinion as to whether or not it is legal to charge the sales tax on such items where the order was given some time ago."

It is my opinion, under the facts stated by you, that a sales tax would be due. While the order was placed September 30, 1936, and the delivery was not made until March 1, 1937, this shows clearly that the sale was not consummated until the delivery which was March 1, 1937, the date the sales tax went into effect. You do not state whether or not the purchase price was paid at the time the order was placed. I am, however, presuming it was not and that the articles were to be paid for when delivered.

Of course, if at the time the order was received the goods were selected and set aside and the purchase price paid, to be delivered later on, this would,

have consummated the sale and no sales tax would attach. But from the facts as stated by you, I am clearly of the opinion such sales tax did attach and should be paid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

Counties—Have no authority to furnish each prisoner, who is a smoker, a ten cents package of smoking tobacco each week where prisoners do not have funds to purchase said tobacco.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 7, 1938, in which you request my opinion as follows:

"Can the County furnish to each prisoner, who is a smoker, a ten cents package of smoking tobacco each week where said prisoners do not have funds to buy smoking tobacco, and will same be a legal charge against the general fund of the County?"

I am of the opinion that your inquiry should be answered in the negative. There is no authority of law, either expressed or implied, which would allow such expenditure by a county.

The policy long adopted in this State is that a county can incur no liability, make no contracts, nor do any act, regardless of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law, or by necessary implication. It has no powers except those which are necessary to the performance of the governmental functions imposed on it.—**Mobile v. Drago,** 172 Ala. 155; **Naftel v. Montgomery County,** 127 Ala. 562; **Jack v. Moore,** 66 Ala. 184; **Quarterly Report of Attorney General, Vol. IX, p. 35.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Sales Tax—Cottonseed meal used for fertilizer is not subject to sales tax.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your request for reconsideration of a recent opinion of this office appearing in Quarterly Report of the Attorney General, Vol. IX, page 29, construing the Sales Tax Act in its application to cottonseed meal procured by farmers in exchange for cotton seed grown by them, which said cottonseed meal was procured for use as a fertilizer, or as ingredient thereof.

The inquiry dealt with in the opinion, supra, was addressed specifically to cottonseed meal **procured to be used as a fertilizer.** However, I understand from your request that certain dealers in cottonseed meal have undertaken to construe the opinion, supra, as a pronouncement that all cottonseed meal, for whatsoever purpose procured, is exempt from the Sales Tax Act.

In view of the situation reflected in your letter, I have decided to extend the opinion for the purpose of making it absolutely clear that it was applicable only to sales and exchanges of cottonseed meal procured for use as a fertilizer or as an ingredient thereof. Pursuant thereto, the opinion is being amended and extended to read as follows:

"This is to acknowledge your request for opinion as follows:

"'I wish to have your opinion on the following matter as early as possible due to the fact that our ginning season is near at hand:

"1. Quite a lot of cottonseed meal is used as fertilizer and since fertilizer is exempt from the two per cent Sales Tax please advise if cottonseed meal bought to be used as fertilizer is also exempt.

"2. The custom has grown in the County and also in other counties over the State of swapping cottonseed at the gin for meal. The ginner takes the seed and swaps them to the oil mill for the meal and in turn swaps the meal to the farmer for his seed. Sometimes the swap is even. Sometimes they will give the farmer more than a ton of meal for a ton of seed and sometimes less, due I presume to the market price of cottonseed oil. Since cottonseed is exempt from the sales tax, please advise if the ginner will be permitted to make the exchange with the farmer without collecting a sales tax on the meal.'"

"Act No. 126, General Acts, 1936-37, page 125, generally known as the Sales Tax Act, provides the tax to which you refer. Section 4 (c), however, exempts from the provisions thereof the sale of quite a number of articles, among which are unprocessed cottonseed and fertilizer.

"It is a matter of common knowledge that in Alabama cottonseed meal exchanged by the ginners for the farmers' cottonseed is used primarily for fertilizer. Therefore, in view of the specific statutory exemption, it is my opinion that the sale or exchange of cottonseed meal procured for

use as a fertilizer, or as an ingredient thereof, is not subject to the Sales Tax. Your inquiry must be answered in the affirmative."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Veterans' Exemptions—Person who enlisted in the Navy of the United States on January 8, 1919, and was discharged on July 11, 1919, held not a veteran within contemplation of the Alabama Veteran's Act, and not entitled to veteran's exemptions from business license under the General Acts of 1935, p. 1057.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of May 19, 1938, in which you request my opinion as follows:

"Enclosed is a copy of the Discharge of Jesse Whitford Smith, Jr. from the Bureau of Navigation.

"Mr. Smith is very anxious to know whether he is entitled to Veteran's exemption under this discharge."

You enclose Mr. Whitford Smith's discharge from the United States Navy, the pertinent part of which I have set out below:

"Washington 9 January 1937

"The records of this Bureau show that Jesse Whitford Smith, Jr., 114-88-52 enlisted in the U. S. Navy 8 January 1919 as Apprentice Seaman at Washington, D. C. and was discharged from the U. S. Navy Recruiting Station, Atlanta, Ga. 11 July 1919 as Ship's Cook 3c with a Good Discharge (Physical disability)."

In reply, I wish to advise that in my opinion your inquiry must be answered in the negative. I assume that you refer to the veteran's exemption from business licenses as provided for by the General Acts of 1935, page 1057, which provides in part as follows:

"Section 1. That every bona fide permanent resident of the State of Alabama who served as an officer or enlisted man in the United States Army, Navy or Marine Corps during the World War, between April 6, 1917, and November 11, 1918, or in the Spanish-American War between April 21, 1896, and July 4, 1902, or who served as an officer or enlisted man in the Army or Navy of the Southern Confederacy during the Civil War, and who, at the time of his application for license, as herein provided for, shall be physically disabled to the extent of 25%, or more, shall upon sufficient identification, upon sufficient proof of such disability

and upon sufficient proof of being a permanent resident of this State, and upon production of an honorable discharge from the service of the United States Army, Navy, or Marine Corps during the World War or Spanish-American, **within the respective limits of time hereinabove prescribed,** or from the service of the Southern Confederacy during the Civil War, be exempt from business or occupational license taxes, to the extent and subject to the conditions hereinafter specified." (Emphasis supplied).

You will note that the exemption here provided is limited to veterans of the World War who served between the dates of April 6, 1917 and November 11, 1918, or to those veterans of other wars whose dates of service are set out in the act above referred to.

In my judgment, Mr. Whitford Smith, whose discharge you enclose, and who is the person here inquired about, is not a veteran within the contemplation of the above named act. I note that Mr. Smith enlisted in the United States Navy under date of January 8, 1919 and was discharged from the Navy with an honorable discharge under date of July 11, 1919. These dates are not included under the terms of the Veterans' Exemption Act above quoted, and in my judgment, Mr. Smith would not be entitled to the exemptions here provided.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. J. H. Williams,
Superintendent of Banks,
State Capitol,
Montgomery, Alabama.

Banks—State Banking Department—

Assessment of $15.00 for each branch of a bank having branch banks held not limited by the $600.00 limitation placed upon assessment of bank's resources, provided for by Section 6287 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request under date of February 1, 1938, in which you request my opinion as follows:

"In making calculation for assessments of banks under my supervision for the calendar year 1938, I am confronted with a question regarding which I desire your opinion. Section 6287 of the Code of Alabama of 1923 reads in part as follows:

" 'and provided that the total assessment shall not exceed $600 per year on any one bank or trust company and provided that a bank having branches shall pay in addition to the above amount $15 for each branch.'

"One of the banks under our supervision which now has total resources of more than $5,000,000 is operating fourteen branches. By cal-

culating the assessment as prescribed by the statute cited above we are not quite clear if the $600 limit would apply.

"Your opinion is, therefore, desired as to whether we should make assessment on the basis of $25 plus 10 cents per thousand or a fraction thereof on its total resources and add thereto $15 for each branch office or if the $600 maximum would apply. We shall await with interest your advices in the premises."

In reply, I wish to advise you that in my opinion you should make the assessment of banks in accordance with the provisions of Section 6287 of the Code of Alabama of 1923, quoted in part by you in your request. In my judgment you should make the assessment here considered on the basis of $25.00, plus ten cents per thousand or fraction thereof on the total resources of the bank having resources of more than five million dollars and operating fourteen branches. It is further my opinion that you should add thereto $15.00 for each branch office of the above named bank.

Referring to Section 6287 of the Code of Alabama of 1923, I wish to call your attention particularly to the following provision of this section:

"Each such bank shall pay twenty-five dollars, and in addition thereto one one-hundredth of one per cent (or ten cents per thousand, or fraction thereof) on its total resources as shown by its last report to the banking department, made by the bank next preceding January first. If a bank shall commence business after such reports are made, then the assessment shall be on the resources as of the day the bank opened for business; and if the bank shall open for business after April first and before July first, the assessment shall be for three-fourths of the year; if it shall open for business after July first and before October first the assessment shall be for one half the year; and if it shall open for business after October first and before December thirty-first, such assessment shall be for one-fourth of the year; but the total assessment shall not exceed six hundred dollars, per year, on any one bank or trust company. A bank having branches shall pay, in addition to the above amounts, fifteen dollars for each branch."

You will note from the above quoted portion of Section 6287 of the Code of 1923 that the assessment of $25.00 and the ten cents per thousand or fraction thereof on the total resources, as shown by the last report to the Banking Department made by the bank, is limited by the provision "but the total assessment shall not exceed $600 per year on any one bank or trust company". Following this statement and in addition to the assessments made up to this point, begins the provision "a bank having branches shall pay, in addition to the above amounts, $15.00 for each branch." In my judgment, the intention of the Legislature is clear that the $15.00 provision for each branch of said bank is in no wise limited or influenced by the limitation of $600.00 per year on any one bank or trust company.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. Chas. E. McCall,
State Auditor,
Capitol.

Pensions—

1. Widow of Confederate Veteran who marries another Confederate Veteran, after death of second husband, entitled to be placed on pension roll by virtue of being widow of second husband who was a Confederate Veteran.

2. Widow of Confederate Veteran, who later attempts remarriage, said marriage being declared null and void, retains her status as widow of Confederate Veteran and is entitled to draw pension, as provided for by Section 2938, Code of 1923, as amended by General Acts of Alabama, 1927, page 88.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of April 14, 1938 in which you request my opinion as follows:

"I am handing you herewith a copy of a letter received from Mrs. Dell O'Neal Hart, Director, Department of Public Welfare, Covington County, Andalusia, Alabama. In this she submits certain questions relative to the reinstatement of a person on the pension roll, who as a widow is drawing pension and who married while on the pension roll and who was dropped from the roll and who subsequently was separated from her husband by regular divorce proceedings. She submits two other questions showing separation under other conditions other than regular divorce.

"For your ready reference, I call your attention to Section 2938 of the Code of Alabama, 1923, which has been modified only by an act of the Legislature 1927, found in General Acts of Alabama, 1927, page 88.

"I feel sure that a widow who remarries and who is subsequently divorced by regular court proceedings is not entitled to reinstatement. Where, however, a marriage was annulled and declared void I do not know whether this would be considered, under the law, remarriage. I am therefore submitting the whole matter to you for your advice."

In reply, I wish to refer you to Section 2938, Code of 1923, as amended by the General Acts 1927, page 88, as follows:

"2938. Widows of soldiers and sailors entitled to pension.—The widow of any soldier or sailor in the service of the State of Alabama or the Confederate States of America such as is set forth in the preceding section, who was married to such soldier or sailor prior to January 1st, 1903, and who has not remarried since the death of such soldier or sailor as whose widow she makes application for pension, and who was not at the time of her husband's death separated from him by divorce or was not voluntarily living apart from her husband during the period of one year prior to his death and whose husband did not desert the service of the State of Alabama or of the Confederate States, and who at the time of filing said application does not own real or personal property or both to the value of five thousand dollars, whether in fee simple or

life interest therein or whose income from all sources does not exceed twelve hundred dollars per annum, who is an actual bona fide resident of Alabama and has been such for a period of three years prior to the filing of said application shall be entitled to relief under the provisions of this article. (1920, p. 168, Section 5; 1923, p. 250, Section 3.)"

You will note that the provisions of law here cited operate to entitle a widow of a soldier or sailor, who was a Confederate Veteran and who has met the requirements of law here set out, to receive a pension. The law specifically provides for a qualifying widow to receive a pension, under this law, until she remarries, at which time she is no longer a widow and may not receive a pension as such. If this same lady again becomes a widow she will not again become entitled to draw the pension by virtue of one time having been the widow of the Confederate Veteran through whom she originally drew a pension. If, however, her last husband was a Confederate Veteran, she may be placed upon the pension roll and receive a pension by virtue of her marriage to the last named Confederate Veteran. I am assuming, of course, that the second husband was, as well as the first, a Confederate Veteran entitled under the law to draw a pension. If the second husband, however, should not be a Confederate Veteran, qualifying under the law for a pension, then in my opinion the widow could not be legally placed on the pension roll to receive a pension.

I call your attention to the last provision of the General Acts of 1927, page 88, as follows:

"Provided her last husband was a Confederate soldier or sailor."

In reply to your second question, I wish to advise that in my opinion the widow of a Confederate soldier or sailor, qualified to receive a pension, whose subsequent marriage was by court decree declared null and void, retains her original status acquired before such void marriage was attempted. In my judgment in this last named case the widow would be entitled to receive any pensions to which she would be entitled but for marriage, since no marriage in contemplation of law has actually been consummated. I wish to refer you to 38 C. J., page 1360, which provides in part as follows:

"Except where the statute otherwise expressly provides, the decree of nullity relates back so as to render the relations of the parties illegal from the beginning, and to restore the parties to their former status and to all rights of property as before the marriage."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. B. T. Prince,
Tax Assessor,
Lee County,
Opelika, Alabama.

Taxation—No authority for Board of Review to consider tax assessment after the close of the tax year in which said assessment is made, unless impeached for fraud or lack of jurisdiction.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of February 23, 1938, in which you request my opinion as follows:

"Is there any law under which the Board of Review has the right to take up for consideration at this time the tax value of any real or personal property for the tax year 1937? In other words would the Board of Review have the right to consider a complaint rendered at this time concerning the tax value of any property for the tax year 1937?

"The Board of Review of this (Lee) County has authorized me to get your opinion on this matter."

In reply, I wish to advise you that in my opinion your inquiry must be answered in the negative, unless impeached for fraud or lack of jurisdiction. I assume that you mean by the statement in your letter, viz, "The tax value of any real or personal property for the tax year 1937", taxes due and payable as of October 1, 1937.

In my judgment the assessment of taxes and valuation of property when once made by the duly constituted authorities is judicial in its nature and unless impeached for fraud or lack of jurisdiction, or unless refused appellate authority, it is final. See **State v. Doster-Northington Drug Co.,** 196 Ala. 450; **Anniston Land Co. v. State,** 185 Ala. 482, 487, 64 So. 110.

In my judgment, no authority exists to re-open a tax assessment which has become final by the closing of the tax year, when it is agreed to or acquiesced in by the failure of the taxpayer to raise any question as to its correctness before the close of the tax year. I refer you to the case of **Doster-Northington Drug Co. v. State,** supra, wherein the court said:

"The reasonable construction of the power of assessment of taxes, and the review thereof, should be to the end that a stable and uniform system prevail in the state; and so when anullment or review is not sought within the period of the tax year, that matured assessments shall be binding alike on the taxpayer, and on the taxing authority."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. Joe O. Brooks, Chairman,
Board of Revenue of Conecuh County,
Conecuh County,
Evergreen, Alabama.

Counties—May rent out idle tractors and road machinery at a reasonable rent, the proceeds of such rent to be paid into the fund out of which the tractors and machinery was purchased.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of November 23, 1937, in which you request my opinion as follows:

"Can Conecuh County, Alabama, and its Board of Revenue lawfully rent out their tractors and road machinery, which is now lying idle and doing nothing on the roads of the County, to the Farm Demonstration Agent of the County, or to Farm Organizations, or Farmers within the County for the purpose of preventing soil erosion by terracing the lands of farmers within the County, provided a reasonable and proper rent for the use of such road machines is paid to the County, especially now when the farms are idle and before planting time begins next year."

I am of the opinion that your inquiry should be answered in the affirmative provided that the rent is sufficient to care for any depreciation caused by the use of the rented tractors and machinery by the parties to whom they are rented. The proceeds received from the rent should be deposited to the fund out of which the tractors and road machinery in question were purchased.—**Biennial Report of Attorney General, 1926-1928, p. 368.**

There is no objection, in my judgment, to the above procedure provided that the machinery in question is not being used by the county in its road and bridge work. The renting out of the tractors and road machinery even to private individuals, when such is not being used by the county, would not, in my opinion, amount to an appropriation of public funds to private individuals. The individual is paying value received for the privilege of using the tractors and machinery and the county is receiving a benefit therefrom.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. James H. Tompkins,
County Solicitor,
Colbert County,
Tuscumbia, Alabama.

Rabies Inspector—

Power of removing duly appointed and approved Rabies Inspector vested in County Board of Health.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter as follows:

"I would like to have a ruling by the Attorney General on the following question. 'Under Section 2, of the Anti-Rabies Act of 1937, can a new Rabies Inspector be nominated without first disposing of the one duly appointed and approved in accordance with said section?

"The facts are these:—

"The Rabies Inspector for this County, was nominated and appointed in 1937 in accordance with said section. Under said section, his term of office is not stated and he can only be removed for cause.

"On the first day of January, 1938, the Colbert County Health Department was instructed by the State Health Department, in Montgomery to have a new Rabies Inspector nominated and appointed.

"Since there is no provision for such action in said Act, I would like to have an opinion on the legality and authority of such action."

The statutory provisions covering the appointment and removal of Rabies Inspectors are found in Section 2 of Act No. 200, General Acts, 1936-37, page 230, approved March 2, 1937. Said section reads as follows:

"Section 2. ENFORCEMENT PROVISION. For the purpose of providing proper enforcement of the provisions of this Act, **each County Board of Health is hereby invested with general supervisory powers, and it shall be its duty, with the approval of the State Health Officer and the State Veterinarian, to designate or appoint, within ninety days of the passage and approval of this Act, a competent Veterinarian or other person properly qualified, who shall be known as the Rabies Inspector,** and such Inspector may select as many deputies to aid him in such enforcement as he may desire. It shall be the duty of the said Inspector, under the direction of the County Board of Health, to enforce the provisions of this Act, and it shall be his duty to inoculate dogs or have the work done by his deputies when called upon to do so, and for the full enforcement of the provisions of this Act, the said Rabies Inspector, and his deputies are hereby clothed with full police power, and the sheriff and his deputies in each county and the police officers in each incorporated city are hereby designated as aids, and instructed to cooperate with said Inspector in carrying out the provisions of this Act. The compensation of the Inspector and his deputies shall be limited to the fees prescribed in succeeding sections of this Act. **The said Rabies Inspector may be removed from office, for cause, by the County Board of Health."** (Emphasis ours).

It can be seen from a reading of the above quoted section of said act that the duty of appointing a Rabies Inspector is placed on the County Board of Health and that the appointment so made by the County Board of Health must be approved by both the State Health Officer and the State Veterinarian. When a person is so appointed by the County Board of Health and is duly approved by both the State Health Officer and the State Veterinarian, he becomes the duly appointed and approved Rabies Inspector.

The last sentence of said section very clearly places the power of removal in the County Board of Health, which is the original appointing power. Therefore, it is my opinion that a duly appointed and approved Rabies Inspector may be removed from office for cause only by the County Board of Health, and that the State Health Department, the State Health Officer, and the State Veterinarian are without power or authority to remove such an Inspector.

Of course, if the State Health Department is of the opinion that a particular Rabies Inspector is not satisfactorily discharging his duties, it could make this fact known to the County Board of Health with a request that the County Board of Health remove the Rabies Inspector. However, in such a case the questions of whether or not there was cause for removing the Rabies Inspector from office and whether or not he should be removed address themselves to the County Board of Health and not to the State Health Department.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. I. T. Quinn,
Commissioner of Game and Fisheries,
State Capitol.

Local Act No. 536, approved September 6, 1927, (Local Acts 1927, page 383) is constitutional.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of February 28, 1938, which is as follows:

"Re: Constitutionality of Local Act of the Legislature No. H-1146, approved Sept. 6, 1927, pp. 383, 384 of Local Acts of Legislature, 1927.

"I will thank you to inform me as to the constitutionality of the above Local Act.

"Enforcement officers find it impossible to enforce the provisions of this Act, due to the impounded waters on both the east and west sides of Coosa County, because there are no markers which designate county boundary lines."

In dealing with your request, I have not examined the journals of the House and Senate to determine whether or not this Local Bill was advertised in accordance with the regulations of the Constitution.

Assuming the local bill was properly advertized and enacted, it is my opinion that the Act is constitutional.

The courts have heretofore laid down the rule that the State by virtue of its police power has authority to make regulations for the preservation of game and fish. **Hyde v. State,** 46 So. 489, 155 Ala. 133.

Legislation designed to regulate activities on Sunday is an exercise of the "police power of the State and is constitutional in the same manner and to the same extent as other regulations resting upon this power." Flannigan v. Meyer, 41 Ala. 132; **Frolickstein v. Mobile,** 40 Ala. 725."

I do not think that the fact that the Act was a local act renders it unconstitutional. True that subsection 14 of Section 104 of the Constitution prohibits special, private and local laws "fixing the punishment of crime." The Supreme Court, however, in the case of **Chancey v. State,** 170 Ala. 83, 54 So. 522, held that subsection 14, supra, did not include misdemeanor. The violation of the law under consideration is made a misdemeanor by statute.

The fact that the Act is difficult of enforcement does not render it unconstitutional. **State v. Montgomery,** 59 So. 294, 177 Ala. 212.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Attention of Mr. Simon Wampold.

Taxation—Redemption—

County not required to make certification required by Section 276 of the Revenue Laws of 1935, as amended, where lands are sold by the State under Section 281 of the Revenue Laws of 1935, under facts stated.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 9, 1938, requesting my opinion as follows:

"June 28th, 1923, property sold by the Tax Collector of Montgomery County for taxes and penalties for 1922 bought in by the State of Alabama. In 1936 the owners of this property came in to the office of the Judge of Probate to redeem said lands from said land sale. This office figured taxes plus interest from the date of sale to the date of redemption together with interest on all subsequent years' taxes. It was the contention of the owner that the amount was excessive and he did not redeem, but subsequently went to the State Land Commissioner, and the State Land Commissioner on August 12th, 1936, sold this property back to the owners for the actual amount of the tax eliminating all interest charges, and gave the owners four years in which to make the payments. The State Land Commissioner then submitted to this office $451.67 less $45.17, being 10% commission to the Land Agent as the County and School part for Montgomery County, and in order for this office to receive this amount of money it was necessary to fill in and sign the following certification:

'I, Judge of Probate of said County do hereby certify that the amount of County Tax, School Tax, Fees and Costs due upon said real estate under Sections 281 and 288, House Bill 324, approved July 10, 1935.'

this to be signed by the Probate Judge. This office at this time did not sign, holding that this was a redemption being made through the State and not through the Probate Judge, and while the Probate Judge was willing to accept this money and distribute it according to instructions from the State, but was not willing to sign the certificate and there the matter remained, status quo.

"Now, under date of April 7th, the State through the Land Commissioner again tendered what is purported to be the second payment and we again refused to sign the certification, that this is the amount of taxes and costs due on said real estate as provided by law, and the State Land Commissioner informs us that this money is deposited with the State Comptroller to the credit of the County and can only be secured for the County if and when the Judge of Probate signs the following:

'I, Judge of Probate of said County, do hereby certify the amount of County taxes, school taxes, Fees and Costs due upon said real

estate as provided by law is and that said amount for County and School Taxes and interest less 10% for Land Agent's commission and naming the amount.'

"This office being unable to determine the correctness of these figures and not wishing to be a party to this transaction except to receive and distribute the money, would like an opinion from your office. Is it necessary in order to obtain this money from the State that the Judge of Probate sign the certification set out on the distribution sheet, and if under the law he is authorized to do this when he does not receive the full amount of taxes due the State or the full amount for which the State proceeding under Section 281 has sold the property, not to a third party but to the original owners?

"We would thank you to go into this matter and let us know under what Section of the Code to proceed as we cannot find any Section that provides for the Judge of Probate to certify to a partial payment from the State Land Commissioner."

You state that the property in question was sold by the State Land Commissioner under the provisions of Section 281 of the Revenue Laws of 1935, (Simon's Revenue Compilation, p. 135) which section provides as follows:

"Section 281. When real estate which has heretofore been sold for taxes and bought in by the State and the period of redemption has expired the State Land Commissioner with the approval of the Governor, may sell all the right, title and interest of the State to such real estate at the best price obtainable and upon such terms as he may determine. Provided, such amount shall not be less than the taxes due thereon for a period of three years, without interest, costs or penalties. (b) Provided, However, that where real estate has been sold for taxes and bid in for the State and not redeemed within five years from date of sale the State Land Commissioner shall have the right to sell the right, title and interest of the State to such real estate at the best price obtainable, irrespective of the amount of taxes due, and upon such terms as he may determine. The provisions of this subsection shall apply to real estate heretofore sold for taxes and bid in by the State and also shall apply to real estate that may be hereafter bid in for the State at tax sales."

You will note from the foregoing section that where real estate has been sold for taxes and bid in by the State and not redeemed within five years from date of sale, as is the case under the facts detailed by you, the State Land Commissioner has the right to sell the property under such terms as he sees fit. In this particular case it appears that he sold the land in question for the total amount of the taxes due less interest and penalties, the price to be paid in four yearly installments.

Under the foregoing circumstances, it is my opinion that the State Comptroller is authorized to draw his warrant on the State Treasury in favor of the Judge of Probate of the county in which the lands lie, for the county and school taxes and the fees and costs due to the different officers of the county, upon certification of the amount received from such sale by the State Land Commissioner. The certification by the State Land Commissioner should be made under Section 288 of the Revenue Laws of 1935 which provides as follows:

"Section 288. When lands bid in by the State have been sold by the State under any of the provisions of this chapter, the State Land Commissioner shall certify to the State Comptroller the amount and the State Comptroller shall draw his warrant on the State Treasurer in favor of

the judge of probate of the county in which the lands lie, for the county and school taxes, and the fees and costs due to the different officers of the county, specifying each separately; and if the same cannot be ascertained from the records and papers in his office, the judge of probate, on notice by the State Land Commissioner of such redemption or sale, must certify the same to him and the judge of probate, upon the collection of such warrant, shall pay the same over to the officers entitled thereto, or authorized by law to receive the same."

You will note, however, that if the amount to be received by the said agencies cannot be ascertained from the record and papers in the Land Commissioner's office, then it becomes the duty of the Judge of Probate upon request of the State Land Commissioner to certify same to him.

However, under the facts detailed in your letter, it appears that the State Land Commissioner must, under Section 288, supra, certify the facts to the State Comptroller who must thereupon draw his warrant as required by said Section 288 and there is no duty upon the Judge of Probate to sign the certification mentioned in your inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1938.

Hon. H. A. Terry, Chairman,
Board of County Commissioners,
Hale County,
Greensboro, Ala.

1. Court of County Commissioners may appropriate proceeds of sales tax for the eradication of Bang's disease, provided the same is in cooperation with the State Board of Health or the Federal Government and is approved by the State Board of Health or the Federal Government.

2. Court of County Commissioners may appropriate county's share of Alabama Beverage Control Act receipts to the general fund for the eradication of Bang's disease, provided the County Health Officer, the County Board of Health and the Court of County Commissioners deem the same to be a public health measure.

3. Court of County Commissioners may appropriate county's share of Alabama Beverage Control Act receipts to be used exclusively for public health, etc., for the eradication of Bang's disease if, in its opinion, the same is a public health measure.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 5, 1938, in which you request my opinion as follows:

"A court of County Commissioners passed a resolution authorizing the county to expend a sum not to exceed $500.00 for the eradication of Bang's disease, (contagious abortion) and they have instructed me to ask

you for a ruling as to where they can pay this from the Sales Tax and Liquor Tax Funds, as this disease is considered by the medical profession, as causing undulent fever in the human race and is considered also by the Health Department as a health measure."

Your letter draws no distinction between proceeds of the sales tax and proceeds from the Alabama Beverage Control Act. However, under the law there is a difference between the purposes for which the County's proceeds under the respective acts may be used. I will, therefore, treat the questions separately.

1. Speaking first to the question of whether or not the proceeds of the appropriation in question can be paid from the sales tax fund, I wish to call to your attention Section 21 of the Sales Tax Act, which reads in pertinent part as follows:

> "* * * provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State and/or the Federal Government, for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension service in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State."

In **Tuscaloosa County vs. Chester Walker,** 178 So. 543, it was held by the Supreme Court, in construing Section 21, that the state agencies mentioned therein, and not the various county governing bodies, were to exercise their judgment as to whether or not the expenditures by the various counties from the Sales Tax Fund were within the meaning of the term "public health."

The following quotation from the Tuscaloosa County case is submitted as an answer to your inquiry:

> "Clearly, therefore, when the Legislature, in Section 21, supra, speaks of expenditure of these funds in cooperation with the county authority, it was not meant that the latter could exercise its own discretion as to the wisdom of such expenditures, and its own judgment as to what in fact was embraced within the influence of the activities of these various governmental agencies. We think the discretion referred to as resting in the county authority was the ascertainment of the purpose or purposes for which the funds were to be expended.
>
> "Thus the county maintains its own initiative and autonomy in determining the purpose or purposes for which the money is to be expended. But we think it equally clear that it was the legislative intent that these State agencies were to exercise their judgment as to whether or not the expenditures were within the meaning of the terms 'public health', 'public welfare', and 'agricultural extension service.'
>
> "There is no just criticism that such construction given the State control of county funds, but it merely places upon the county the restraint of a guiding hand trained and experienced, concerning the funds the State has allocated to the counties for definite purposes."

You will see from the foregoing that while the county may determine that it desires to expend money for the eradication of Bang's disease, and the amount to be so expended, before the sales tax fund may be used for this purpose it is necessary that the State Health Department or the Federal

Government approve the expenditure as being within the meaning of the term "public health."

2. The next question is as to the use of the county's share of the Alabama Beverage Control Act receipts for the purpose set out in your letter. The county's share of the Alabama Beverage Control Act receipts is divided into two classes, in so far as the use which can be made of the same is concerned, part of the same going to the general fund of the county and the other part to be used exclusively for the purposes of Public Health, Old Age Pensions and for other purposes of the County Departments of Public Welfare.

The following are pertinent provisions of the act in regard to the county's share of the Alabama Beverage Control Act receipts going to the general fund.

Section 9 (c) of said Act, which is the section providing for the division of the net profits derived from the proceeds of the State Liquor Stores under the provisions of said Act, reads in pertinent part as follows:

> "* * * Ten percent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds * * *;"

Section 12 of said Act provides in part:

> "All license fees collected under this Section shall be collected by the Board for the use of the county in which such licenses were levied and in which the applicant's place of business is located, and shall be paid over to said county at quarterly intervals."

Section 22 (7) of said Act reads in part:

> "License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied."

All of these receipts go to the general fund of the county.

Sub-section 12 of Section 1058, Code of Alabama, 1923, as amended by Act 443, General Acts 1935, p. 918, approved September 13, 1935, provides in pertinent part as follows:

> "The Court of County Commissioners or other like body * * * may in its discretion appropriate from the revenues of the county, money for the prosecution of public health work, which has been recommended by the county health officer and endorsed by the County Board of Health and approved by the said Court of County Commissioners, or other like board."

The reference in said subsection of Section 1058, as amended, supra, to the "revenues of the county" means, of course, "the general fund of the county." **Weaver vs. Tidwell**, 288 Ala. 169. Therefore, if the County Health Officer and the County Board of Health and the Court of County Commissioners deem the eradication of Bang's disease to be a health measure, under the provisions of said subsection of Section 1058, as amended, supra, the county's share of the Alabama Beverage Control Act receipts for the general fund may be used for such purpose.

The other provision in regard to the use of the county's share of the Alabama Beverage Control Act receipts is found in the following excerpt from Section 9 (c) of said Alabama Beverage Control Act:

"* * * ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties, and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Departments of Public Welfare; * * *"

Since there is no requirement in this provision that the funds to be used for the purpose of public health etc., must be used in cooperation with, or approved by, the State Board of Health or the Federal Government or the County Health authorities, and the Court of County Commissioners has general supervision over the expenditure of all county funds, except as limited by statute, it is my opinion that this part of the county's share of the Alabama Beverage Control Act receipts may be used for the purpose mentioned in your letter of inquiry, provided that the Court of County Commissioners is of the opinion that the same is for a public health purpose.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 29, 1938

Department of Public Health,
Montgomery, Alabama.

Attention: Dr. Douglas L. Cannon.

1. Lien of municipality for installing a septic tank under Code Section 2051 not transferable.

2. Municipality not entitled to collect interest on amount of such lien.

Opinion by Assistant Attorney General Garrett.

Gentlemen:

I have your letter of April 27, 1938, in which you request my opinion as follows:

"Attached hereto is Section 2051 of the Code of Alabama of 1923, as amended by the Acts of 1927, and as amended by the Acts of 1935, being so amended and passed in the Legislature during the regular session of 1935.

"We request your opinion on the following:

"1. When a municipality acquires a lien against a property by installing a water closet, a privy, or a septic tank under the provisions of Section 2051 of the Code of Alabama of 1923, as amended by Acts of 1927, and as amended by Acts of 1935, is the lien acquired by the municipality transferable to any person, firm or corporation?

"2. In the collection of the aforementioned lien, does the municipality have legal right to charge and collect the legal rate of interest on the amount of the acquired lien?

"3. Presuming that the aforementioned lien is transferable by the municipality to any person, firm, or corporation, does the person, firm, or

corporation have legal right, in the collection of the lien to charge and collect the legal rate of interest on the amount of the lien so acquired from the municipality?"

Under the statute in question, as amended, the city or town may install such septic tanks as it deems advisable and make proper connections, "the expense of same to be assessed against the property, and the cost thereof to be a lien upon the property in favor of the city or town, superior to all other liens, to be collected as other debts are collected or liens enforced."

Municipal power is delegated power derived from, and part of, the legislative power of the state. **Mitchell v. City of Birmingham,** 222 Ala. 389, 133 So. 13. In the absence of express legislative enactment, a taxation or assessment lien of a municipal corporation is not transferable or assignable. 61 C. J. 948. The system of farming out taxes or selling the right to collect taxes and assessment liens, prevalent some centuries ago, is now opposed to a long settled policy of this state. While under Section 2223 of the Code of Alabama of 1923, municipal corporations are given the right to issue bonds or to borrow money for public improvements, that power is limited to providing funds to pay the cost of improvements made pursuant to Article 33, Chapter 43 of the Code. It results, therefore, that this statute permitting the assignment of liens for municipal improvements such as streets, sidewalks and sewers is not broad enough to include the particular municipal improvement here involved. It is, therefore, my opinion that the municipality has no authority to transfer any lien acquired by it under the provisions of Section 2051 as amended.

2. Your next question is whether the municipality has the legal right to collect interest on the amount expended by it for the benefit of the property owners for which amount it acquires a lien pursuant to the above named statute.

Assessments for public improvements are in the nature of taxes. In 44 C. J. 481, par. 2807, we find the following statement on this subject:

"It is very generally held that special assessments or special taxes to pay for local improvements are not taxes in the ordinary sense of the term. They are not taxes within the meaning of the term as generally understood in constitutional restrictions and exemptions. Nevertheless, it is equally well settled that the power to levy special assessments and taxes for local improvements is not an exercise of the power of eminent domain; that special assessments and special taxes are at least in the nature of a tax, because they must be levied for a public purpose, and because they are an enforced contribution on the property owner for the public benefit; **that the levy thereof is an exercise of and referable to the taxing power,** and an attribute of sovereignty; and that a municipality imposing assessments on property benefited does not act as agent of the owners assessed." (Ehphasis ours).

In support of the emphasized portion of the above quoted statement, there is cited, among a long list of cases from other jurisdictions, the case of **Bradford v. Huntsville,** 215 Ala. 591. In that case, Mr. Justice Sayre of the Supreme Court spoke to this question as follows:

"That the right to assess abutting property for the cost of a local improvement involves an exercise of the taxing power cannot be denied. French v. Barber Asphalt Co., 181 U. S. 324, 21 S. Ct. 625, 45, L. Ed. 379; Ford Dillon Mun. Corp. Section 1431. This, the cases decided by this court do not deny or question."

To like effect is the following statement from the case of **Stovall v. City of Jasper,** 218 Ala. 282:

> "The power delegated to municipalities to assess the cost of public improvements against the property benefited and within the class is a legislative taxing power, * * *"

Thus, it may be said that this assessment for the public improvement here under consideration is a tax, or at least in the nature of a tax.

We then must decide whether or not the municipality has the legal right to collect interest on such an assessment or tax. It is well settled in the state courts that, in the absence of a specific statute so providing, interest is not recoverable on taxes. In 61 C. J. 1515, par. 2218, we find the following statement on this subject:

> **"The state and territorial courts * * * have held that interest is not recoverable on delinquent taxes due the state, or territory, or a political subdivision thereof, unless it is expressly so provided by statute,** basing their decisions on the grounds that an obligation to pay taxes is not founded on contract, express or implied, or that a tax is not a debt." (Emphasis ours).

Cited in support of the emphasized portion of the above quoted statement is the Alabama case of **Perry County v. Selma, Marion & Memphis, R. R. Co., Hale County v. Selma, Marion & Memphis R. R. Co.,** 65 Ala. 391.

To like effect is the Mississippi case of **Illinois Central R. R. Co. v. Adams,** 29 So. 996, wherein it was held that the provisions of a section of the Mississippi code then in effect, declaring a tax to be a debt, did not authorize the collection of interest on delinquent taxes under Section 2348 of that Code, authorizing interest on contractual obligations, since it is a debt arising as a matter of law, and not from contract.

In the case of **Stovall v. City of Jasper,** supra, Mr. Justice Thomas for the Supreme Court gives an excellent collation of the authorities on the general subject of assessments for public improvements bearing interest in the absence of an applicable statute or charter so providing. At the risk of tedium, we here quote at length from that opinion:

> " 'According to the weight of authority an assessment does not bear interest in the absence of an applicable statute or charter so providing.' 44 C. J. 795, Sec. 3391."
>
> "We have indicated that the weight of authority is that a 'special tax bill' or a municipal assessment will not bear interest in the absence of an applicable statute so providing. Such is the declared rule in California, Himmelman v. Oliver, 34 Cal. 246; Haskell, v. Bartlett, 34 Cal. 281. Connecticut, Selleck v. French, 1 Conn. 32, 6 Am. Dec. 185; Sargent & Co. v. Tuttle, 67 Conn. 162, 34 A. 1028, 32 L. R. A. 822; Walsh v. Barthel, 85 Conn. 552, 556, 84 A. 91; Hartford v. Poindexter, 84 Conn. 121, 79 A. 79. Illinois, Murphy v. People, 120 Ill. 234, 11 N. E. 202; McChesney v. Chicago, 213 Ill. 592, 73 N. E. 368. New Jersey, Brennert v. Farrier, Collector, 47 N. J. Law 75. New York, Matter of Whitlock Ave., 51 App. Div. 436, 64 N. Y. S. 717. Texas, Galveston v. Heard, 54 Tex. 20, 447. Washington, Shmuck v. Wheeler, 98 Wash. 535, 167 p. 1126. And in Missouri that court has gone to the extent of declaring, in Coatsworth Lumber Co. v. Owen, 186 Mo. App. 543, 172 S. W. 436, that, where there is statutory authority, in the absence of a **provision for interest in the ordinance for the improvement,** or in the 'tax bill itself,' the same does not bear interest. In Sargent & Co. v. Tuttle, 67 Conn. 162, 166, 34 A. 1028, 1029, 32 L. R. A. 822, 823, it is

declared of the matter by the Connecticut court, that assessments 'upon specific property specially benefited by a local public improvement, for the purpose of paying the expense (thereof) are taxes;' that—

" 'The second proposition, to the effect that a tax carried no interest, as such, nor by way of penalty for nonpayment, unless the law so provides, is, we also think, a correct statement of the law. Most of the cases in which interest may be recovered, under our law, in the absence of any statute regulating the matter, are enumerated in Selleck v. French, 1 Conn. 32, 6 Am. Dec. 185; and clearly assessments of this kind do not come within any of the classes of cases there enumerated. It will, we think, also be found true that whenever taxes have carried interest, either as such, or by way of penalty it has been by virtue of some statutory provision to that effect. And it is as it should be. At best, a tax is a burden — a necessary one, it is true, but none the less a burden — imposed on the taxpayer without reference to his consent; and it seems reasonable to hold that any increase of that burden, by way of penalty or otherwise, should be expressly made by the power which imposes it, and that, until the legislative will to increase the burden by the addition of interest has been clearly expressed, interest should not be allowed. This conclusion, which on principle seems reasonable, is supported more or less strongly by the following authorities: Camden v. Allen, 26 N. J. Law, 398; Belvidere v. Warren R. Co., 34 N. J. Law, 193; Brennert v. Farrier, 47 N. J. Law 75; Danforth v. Williams, 9 Mass. 324; Shaw v. Peckett, 26 Vt. 482; Perry v. Washburn, 20 Cal. 318; People v. Gold & Stock Teleg. Co., 98 N. Y. 67; Western Teleg. Co. v. State, 55 Tex. 314; Cooley, Taxn, 300 note 4.'

"In City of Hartford v. Poindexter, 84 Conn. 121, 135, 79 A. 79, 84, the general rule is this stated:

" 'An assessment for benefits carries no interest as such or by way of penalty unless the law so provides. Sargent & Co. v. Tuttle, 67 Conn. 162, 167, 34 Atl. 1028, 32 L. R. A. 822; Hartford v. Mechanics' Savings Bank, 79 Conn. 38, 40, 63 Atl. 658."

The statute in question, as amended, makes no provision whatever for the cost of the public improvements there authorized to be made to bear interest. Nor are we able to find any other applicable statute so authorizing interest.

The premises considered, there being no statute so authorizing, it is my opinion that the municipality has no legal right to collect interest on the amount expended by it for the improvements authorized under said Section 2051, as amended, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 19, 1936

Hon. Homer F. Mitchell,
Judge of Probate, Cullman County,
Cullman, Alabama.

Taxation—Redemption—Parties redeeming land under Section 269 of the Revenue Act of 1935, as amended, are required to pay the amounts determined according to the method provided by Section 269 for the years subsequent to the year for which the property was sold, but are not required to pay taxes which, if regularly assessed, would not be due at the time of redemption.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of March 13, in which you state:

"Please give us an opinion on the following:

"Should the Probate Judge require payment of 1936 taxes in redemption of lands, sold to the State for taxes for previous years?

"We herewith enclose copy of letter of Henry Long, Land Commissioner, and would like to know if same is applicable to Cullman County.

"Please give us this information at once, as there are several parties who want to redeem their property, but do not feel that they should pay 1936 taxes.

In reply, I call to your attention subsection (b) of Section 269 of the General Revenue Act of 1935 as amended by Act No. 526 approved September 14, 1935 (General Acts 1935, page 1113) which reads as follows:

"Upon application to the probate judge to redeem land, where the same has been sold to the State for taxes, which application shall be made on blank forms furnished by the State Land Commissioner, the Probate Judge shall submit such application to the Tax Assessor of the County in which the land sought to be redeemed is located and the Assessor shall, without delay, enter on such application an assessment value for each of the years for which taxes are due, subsequent to the year for which such land was sold to the State for taxes, and such assessment value shall be sixty per cent of the fair and reasonable market value of such lands as of October 1st of the year or years subsequent to the year for which the land was sold for taxes."

You will note that this subsection provides that the tax assessor shall "enter an assessment value for each of the years for which taxes are due subsequent to the year for which such land was sold."

I also note the letter which you inclosed from the Hon. Henry S. Long, State Land Commissioner, stating that the department is construing this provision to include taxes due.

From the language it would appear that the payment of subsequent taxes is limited only to the years for which taxes would be due had the same been regularly assessed. If you mean by 1936 taxes, taxes which in an ordinary case would have been assessed as of October 1, 1935 and the payment thereof would be due October 1, 1936, the same are not payable on redemption as they are not actually due until October 1st, 1936. The same reasoning, of course,

would apply to taxes assessable as of October 1, 1936, on which taxes would be payable October 1, 1937.

I also note your inquiry if the ruling of the State Tax Commission applies to Cullman County. It is needless, it would seem, to point out that the very essence of any tax law is its uniformity through the State and, of course, Section 269 applies to Cullman County as fully as to any other County in the State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 21, 1937

Hon. Harry Simon,
State Tax Commission,
Montgomery, Alabama.

Schedule 12, Section 348, Revenue Acts 1935. No license levied where place of business outside limits of any city or town.

Municipal corporations—"Town" as defined by statute is a corporation, and unincorporated town not recognized in Alabama.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 25, 1937, in which you request my opinion as follows:

"Under this Schedule there is levied a license on each automobile dealer or each agent of an automobile dealer, based on the population of the city or town in which such dealer's place of business is located. The pertinent part of this Schedule on which we are basing this request, is the levy of a license for each place of business, to-wit:

"In cities or towns having a population of 2500 or less, etc.

"Your opinion is requested as to whether or not an automobile dealer who has a place of business without the corporate limits of any town would be required to pay an automobile dealer's license, as provided by Schedule 12, supra.

"Also advise if it is your opinion that an automobile dealer with an established place of business within the city limits of a town which is unincorporated, would be subject to the license."

In answer to your first question, it is my opinion that no license is levied under said Schedule 12, on a place of business outside a city or town. Schedule 12, Section 348, as amended by the Act No. 163, Extra Session 1936-37, provides a license shall be levied and collected.

" * * * for each place of business, to-wit: in cities or town having a population of:

2,500 or less	$50.00
over 2,500 to 5,000	$75.00 etc."

No license is expressly levied for any place of business outside a city or town. In numerous schedules, the words are used "all other places" (Sched. 1) or "all other places whether incorporated or not," (Sched. 3, 7, 16, 32, etc.). The failure to use a similar phrase in Schedule 12 indicates a clear legislative intention to levy such license only on those places of business in a city or town.

2. Your second question is, whether such license is levied on a place of business in an unincorporated "town." In my opinion this question should also be answered in the negative. All statutes should be construed in harmony. Under Section 1743 of the Code of Alabama, "cities" and "towns" are defined. It is there provided that "all incorporated municipalities containing more than one hundred and less than 2000 inhabitants, shall be called towns." No provisions are found in the Statutes of Alabama permitting or regulating unincorporated towns. It is therefore my opinion that the words "Cities or towns" used in this Statute refer to cities or towns as defined in Section 1743, and no license is levied on a business located in an unincorporated "town."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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